(17,411.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 297.

L. J. BRYAN, AS MARSHAL, FOR THE USE OF CREDITORS, PETITIONER,

vs.

LOUIS BERNHEIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1900.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1898, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

In re D. ABRAHAM, Bankrupt.

LOUIS BERNHEIMER, Appellant,
versus
L. J. BRYAN, Marshal for Use of Creditors, Appellee.

Be it remembered that heretofore, to wit, on the 18th day of January, 1899, a transcript of the record of the above-styled cause from the district court of the United States for the middle district of Alabama was filed in the office of the clerk of said United States circuit court of appeals, in the words and figures following, to wit:

1 In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

SATURDAY, *December 24th*, 1898.

Present and presiding: The Hon. John Bruce, judge of the district courts of the United States for the northern and middle districts of Alabama.

The following proceedings were had in the matter of—

A. C. BARLER MANUFACTURING COMPANY ET AL.
vs.
D. ABRAHAM, Alleged Bankrupt. } Creditors' Petition.

To the Honorable John Bruce, judge of the district court of the United States for the middle district of Alabama:

The petition of A. C. Barler Manufacturing Company, a corporation organized under the laws of the State of Illinois and with its principal place of business in the city of Chicago, county of Cook, and State of Illinois; also the petition of the F. H. Lawson Co., a corporation organized under the laws of the State of Ohio, and with its principal place of business in the city of Cincinnati, county of Hamilton and State of Ohio; also the petition of C. T. Ham Manufacturing Co., a corporation organized under the laws of the State of New York, and with its principal place of business in the city of Rochester, county of Monroe and State of New York; also the petition of the American China Co., a corporation organized under the laws of the State of Ohio, and with its principal place of business in

the town of Toronto, county of Jefferson a-d State of Ohio;
2 also the petition of H. L. Judd & Co., a corporation organized under the laws of the State of New York, and with its principal place of business in the city of New York, county of New York and State of New York, respectfully showeth:

That each of said petitioners and all of them are creditors of D. Abraham, who, for a period of one year and more next preceding the date of the filing of this petition, has resided at Montgomery, in the county of Montgomery, State of Alabama, and district aforesaid; that each of your petitioner's demands is provable against the said D. Abraham in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898; that petitioners believe that said D. Abraham owes debts to an amount largely exceeding the sum of five thousand dollars; that the demand of your petitioner, A. C. Barler Mfg. Co., is for to wit: $215.93; that the demand of your petitioner The F. H. Lawson Co., is for to wit: $161.90: that the demand of your petitioner C. T. Ham Mfg. Co., is for to wit: $123.83; that the demand of your petitioner, H. L. Judd & Co., is for to wit: $144.55; that the demand of your petitioner, The American China Company is for to wit: $150.55. That the aggregate amount of your petitioners' demands against the said D. Abraham, exceeds the amount of five hundred dollars, and are founded each upon an open account against the said D. Abraham, made and entered into and incurred as follows, to wit:

A. C. Barler Mnfg. Co., Sept. 22nd, 1898.
The F. H. Lawson Co., Sept. 15th, 1898.
C. T. Ham Mnfg. Co., March 17th, 1898.
American China Co., August 5th, 1898.
H. L. Judd & Co., August 24th, 1898.

And your petitioners further represent, that within the four calendar months next preceding the date of this petition, the said D. Abraham did commit an act of bankruptcy within the meaning of said act, to wit: In that the said D. Abraham did heretofore to wit, on the 29th day of October, A. D. 1898, make a general assignment for the benefit of his creditors, which said assignment was on that day filed in the office of the judge of probate of the county of Montgomery, State of Alabama and in the said district aforesaid.

Wherefore your petitioners pray that he, the said D. Abra-
3 ham, may be declared a bankrupt, and that subpœna may issue to the said D. Abraham to appear and plead to this petition; and that his property may be distributed according to law; and that such further proceedings may be had thereon as the law in such cases provides.

A. C. BARLER MANUFACTURING CO.,
THE F. H. LAWSON CO.,
C. T. HAM MANUFACTURING CO.,
AMERICAN CHINA CO.,
H. L. JUDD CO., *Petitioners*,
By MERTENS & WILKINSON, *Their Attorneys.*

MERTINS & WILKINSON, *Attorneys.*

Oath to Foregoing Petition.

UNITED STATES OF AMERICA,
The Middle District of Alabama, } ss:

I, G. F. Mertins, do hereby make solemn oath that I am a member of the law firm of Mertins & Wilkinson, whose names are signed as attorneys for the foregoing petitioners, and by whom the said petitioners sign as their attorneys, and that the statements contained in the foregoing petition are true according to the best of my knowledge, information and belief.

G. F. MERTINS.

Subscribed and sworn to, before me, this, the 7th day of November, A. D. 1898.

J. P. DIMMICK,
Deputy Clerk U. S. Dist. Court, Mid. Dist. of Alabama.

Filed Nov. 7, 1898.

J. W. DIMMICK, *Clerk.*

Adjudication.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

In the Matter of A. C. BARLER MFG. CO. ET AL.
vs.
D. ABRAHAM, by Whom a Petition for Adjudication of Bankruptcy was Filed against said D. Abraham on November 7th, 1898, in said Court.

At Montgomery, in said district, on the 12th day of December, 1898, upon good proof before me made and taken, I, John
4 Bruce, judge of said district court, do find that the said D. Abraham has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and I do hereby declare and adjudge him a bankrupt accordingly.

JOHN BRUCE, *Judge.*

Filed Dec. 12, 1898, at 4.50 p. m.

J. W. DIMMICK, *Clerk.*

Petition for Order for Marshal to Take Charge of Property.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

A. C. BARLER MANUFACTURING CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

Your petitioners, the undersigned creditors of D. Abraham, the bankrupt in this cause, respectfully show unto your honor that heretofore to wit: on the 12th day of December, 1898, upon a petition heretofore filed by them in this cause, the said D. Abraham was by this court adjudicated a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States." That on to wit: the 29th day of October, 1898, and prior to said adjudication, the said D. Abraham executed and delivered unto H. C. Davidson a deed of assignment by which he conveyed unto said Davidson all of his property and effects for the equal benefit of his creditors. That upon the delivery of said deed of assignment to him the said H. C. Davidson entered upon the execution of said trust. That afterwards, as required by the laws of the State of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee in the office of the register in chancery of Montgomery, Alabama, by which inventory it is shown that the estate of the said D. Abraham, consisted mainly of a stock of goods, wares, merchandise and book accounts located in a storehouse number 106 Dexter avenue. That appraisers were appointed by the said register in chancery to appraise said property, and in accordance with said appointment, they accordingly appraised all the effects of the said D. Abraham and made a return thereof to said chancery court. That the appraisement of said property is fixed by said appraisement is the sum of to wit, $7,900.00.

That on to wit the 7th day of November, 1898, your petitioners filed in this court their original petition praying that said Abraham be adjudicated a bankrupt upon the ground that he had executed and delivered said deed of assignment and upon the filing of said petition in this court, your petitioners are advised by counsel and therefore aver that this court obtained jurisdiction over said estate of said Abraham, and it was the duty of the said H. C. Davidson as assignee of said Abraham, to hold all of the property and effects of the said Abraham in his possession, subject to the orders and decrees of this court; but the said Davidson disregarding the authority and jurisdiction of this court, proceeded to sell and dispose of said property, and did dispose of the same for a sum greatly less than the appraisement as made by said appraisers. That the purchasers of said property have been in possession of the said stock of goods, wares and merchandise for several days, selling and dis-

posing of the same at retail trade and at such prices as said purchasers claim to be bankrupt prices. Your petitioners are informed and believe and upon such information aver and state that said property was sold for greatly less than its value and that unless this court makes an order requiring the said property to be taken immediate possession of, that your petitioners and all other creditors of the said Abraham will be greatly damaged thereby and the *pro rata* share to which they are entitled out of the effects of the said D. Abraham will be greatly lessened.

Your petitioners therefore pray that your honor make an order requiring L. J. Bryan, the marshal of the middle district of Alabama, to take charge of all of the property and effects belonging to the said D. Abraham at the time of the making of his deed of assignment to the said H. C. Davidson, wherever the same may or can be found, and further requiring the said H. C. Davidson to deliver to the said L. J. Bryan as marshal the books of accounts, papers, choses in action and any other property or effects which may be in his possession belonging to the said D. Abraham, and further authorizing the said L. J. Bryan as marshal to take possession of all of the property sold by the said H. C. Davidson as assignee to L. Bernheimer or to any one else, and which is particularly located in said storehouse
6 known as No. 106 Dexter avenue, in the city of Montgomery, Alabama; and that the said L. J. Bryan as marshal be required to hold all of said property so coming into his possession until the further orders of this court.

A. C. BARLER MFG. CO.,
C. T. HAM MFG. CO.,
THE F. L. LAWSON CO.,
AMERICAN CHINA CO.,
H. L. JUDD & CO.,
By G. F. MERTINS, *Their Attorney.*

UNITED STATES OF AMERICA, }
Middle District of Alabama. }

Before me, John Bruce, judge of the United States circuit and district court for the middle district of Alabama, personally appeared G. F. Mertins, who being by me first duly sworn, deposes and says that the creditors whose names are signed as petitioners to the above and foregoing petition are all non-residents of the State of Alabama; that he is the duly authorized and lawful attorney of said named petitioners and that he as such attorney states that the allegations in the foregoing petition wherein the same are alleged as facts, are true and that the allegations alleged upon information and belief are believed to be true.

G. F. MERTINS.

Subscribed and sworn to before me this, the 12th day of December, 1898.
JOHN BRUCE, *Judge.*

Filed Dec. 12, 1898, at 4.53 p. m.

J. W. DIMMICK, *Clerk.*

Order for Marshal to Take Possession of All the Property of D. Abraham, and Demand and Receive from H. C. Davidson, Assignee, Books of Accounts, etc.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

A. C. BARLER MANUFACTURING CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

The petition of A. C. Barler Manufacturing Co. *et al.*,
7 wherein they pray for an order in said cause requiring L. J Bryan, the marshal of the middle district of Alabama, to take possession of the property of the bankrupt in this cause, coming on this day to be considered by the court, and it appearing from said petition that after the filing of the original petition in this cause praying that said Abraham be adjudicated a bankrupt, that H. C. Davidson, to whom the said D. Abraham had, before the filing of the original petition, made a deed of assignment for the benefit of all of the said Abraham's creditors, did sell and dispose of certain property and effects of said D. Abraham for a sum greatly less than its value and without any authority or direction from this court, and that said property is now in possession of the purchasers and being disposed of by them, and it further appearing to the court from said petition, that the creditors of the said D. Abraham will be greatly damaged unless said property is taken possession of by this court, and it further appearing from said petition that it is necessary to the interest of the creditors of the said D. Abraham that this court take possession of all the property and effects of the said D. Abraham, now therefore it is the opinion of the court that said petition should be granted, and it is accordingly ordered, adjudged, and decreed that L. J. Bryan, the marshal for the middle district of Alabama, take immediate possession of all the property and effects owned by the said D. Abraham at the time of the making of said deed of assignment wherever the same may or can be found, and further that he demand and receive from H. C. Davidson as assignee the books of accounts, papers or any other effects of said Abraham which may be in the possession of the said Davidson as assignee, and further that he demand, receive and take possession of all the property sold by the said Davidson as assignee to L. Bernheimer, or any one else, and which may now be particularly located in that certain storehouse on Dexter avenue in the city of Montgomery, known as No. 106; and that the said L. J. Bryan as such marshal, hold all of such property so coming into his possession until the further orders of this court.

Dated this December 12, 1898.

JOHN BRUCE, *Judge.*

Filed Dec. 12, 1898, at 4.50 p. m.

J. W. DIMMICK, *Clerk.*

8 *Order to Louis Bernheimer to Propound Claim within Ten Days.*

United States District Court for the Middle District of Alabama. In Bankruptcy.

In re D. ABRAHAM, Bankrupt.

This cause coming on to be heard on the petition of the marshal for instructions in reference to goods seized by him under a former order of this court, and the same being considered by the court, it is ordered that Louis Bernheimer be notified to appear before this court within ten days from the date hereof, and propound any claim he has to the goods so seized, or to any part thereof, or failing therein, that he will be decreed to have no claim or right thereto.

The marshal is directed to retain possession of all said goods until further orders of this court.

The clerk of this court will issue and cause to be served on said Bernheimer a copy of this order.

JOHN BRUCE, *Judge.*

Filed Dec. 13, 1898, at 11.50 a. m.

J. W. DIMMICK, *Clerk.*

Petition of Creditors for Order to Require L. Bernheimer to Turn Over Proceeds of Sale, etc.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

A. C. BARLER MANUFACTURING CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

Your petitioners, the undersigned creditors of D. Abraham, respectfully show unto your honor that on, to wit, the 29th day of October, 1898, the said D. Abraham did make and deliver a deed of assignment to H. C. Davidson, who is a resident citizen of Montgomery, city and county and State of Alabama and district aforesaid. That thereafter on, to wit, the 7th day of November, 1898, your petitioners did file in this honorable court a petition alleging

9 that the said D. Abraham had committed an act of bankruptcy in executing said deed of assignment and asked that the said D. Abraham be declared and adjudged a bankrupt under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States." That thereafter, to wit, on the 12th day of December, 1898, said petition coming on to be heard, after a consideration of the evidence, the said D. Abraham was by this court duly adjudged a bankrupt within the meaning of said act aforesaid.

Your petitioners further show that, after the filing of their said petition in bankruptcy against the said D. Abraham and in disre-

gard of the proceedings therein pending, the said H. C. Davidson did, as your petitioners are informed and believe, on or about to wit, the 17th day of November, 1898, turn over to and deliver to one L. Bernheimer, all of the stock of goods which belonged to the estate of the said D. Abraham, and which were located in storehouse No. 106 Dexter avenue, in the city of Montgomery, Alabama, said district aforesaid. That thereafter the said L. Bernheimer, who is a resident citizen of the city and county of Montgomery, State of Alabama, and said district aforesaid, did, in disregard of the proceedings pending in this court, proceed to sell, transfer and deliver, largely for cash, said stock of goods as aforesaid. Your petitioners are informed and upon such information show, that the said stock of goods at the time the said Bernheimer took possession thereof, was worth to wit: the sum of about $10,000.00. Your petitioners are informed and believe, and upon such information show that the said L. Bernheimer sold large quantities of said goods while the same was in his possession to wit: from November 17th, 1898, up to and during December 12th, 1898, when the balance of said stock was taken by an order of this court into the hands of the marshal of this court. Your petitioners are informed and believe that the said L. Bernheimer received from said sales and transfers of goods which belonged to the estate of said D. Abraham, large sums of money. Your petitioners are informed and believe, and upon such information show, that the said L. Bernheimer, at the time he took possession of said stock of goods, had knowledge of the proceedings in bankruptcy pending in this honorable court against the said D. Abraham. Your petitioners are advised by counsel and upon such advice and information show that the said L. Bernheimer, as against these petitioners in bankruptcy, did not and could not acquire title to the property of the said D. Abraham, and that said monies so received by the said L. Bernheimer from sales and transfers of said property and goods belongs to the estate of the said D. Abraham, bankrupt.

The premises considered, your petitioners pray that an order may be issued by this honorable court directed to said L. Bernheimer, calling on him to file with the referee in bankruptcy, on a day named, a sworn statement of all monies which the said L. Bernheimer has received from the sale or transfer of said goods of D. Abraham, owned by him at the time of making his said deed of assignment, as well as such evidences of indebtedness as he may have received from any one for such sales, and that the said referee hold a reference to ascertain and report the correctness of such statement and await the further orders of this court.

A. C. BARLER MFG. CO.,
THE F. H. LAWSON CO.,
C. T. HAM MFG. CO.,
H. L. JUDD & COMPANY,
AMERICAN CHINA COMPANY,
By G. F. MERTINS, *Their Attorney.*

G. F. MERTINS, *Attorney.*

District Court of the United States, Middle District of Alabama.

Personally appeared before me J. P. Dimmick, deputy clerk of said court, G. F. Mertins, who is known to me and who being by me first duly and legally sworn, says on oath that he is attorney for the above-named petitioners and that the facts set forth in the foregoing petition which are stated as true, are true, and where they are stated upon information and belief, they are believed to be true.

G. F. MERTINS.

Sworn to and subscribed before me this, the 17th day of December, 1898.

J. P. DIMMICK,
Deputy Clerk.

Filed Dec. 17, 1898, at 1.00 o'clock.

J. W. DIMMICK, *Clerk.*

11 *Answer of L. Bernheimer to Petition for Order to Show Cause.*

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

In re D. ABRAHAM, Bankrupt.

Answer of L. Berheimer, claimant, to petition requiring him to account for and turn over to the marshal proceeds of sale of certain goods, etc.

The claimant, Louis Bernheimer, respectfully represents to the court, that as purchaser of the stock of goods formerly belonging to said bankrupt, under a sale thereof made by H. C. Davidson, to whom said bankrupt had assigned said goods, he entered into the possession thereof; that while in such possession, and in the regular course of trade and before the marshal of this court, in obedience to its order heretofore issued, seized said goods, claimant sold a portion thereof and received the proceeds of such sales; that the daily sales made by him of such goods were as follows:

Nov.	18	$39.15
	19	155.60
	21	310.50
	22	202.20
	23	189.65
	24	127.30
	25	138.10
	26	141.10
	28	83.05
	29	166.85
	30	107.70
Dec.	1	209.60
	2	114.90
	3	104.00

5.....	145.50
6.....	123.00
7.....	74.00
8.....	144.75
9.....	25.00
10.....	62.25
12.....	104.20
	$2,768.40

12 Amounting in the aggregate to two thousand seven hundred, sixty-eight and $\frac{40}{100}$ dollars; that at the time of the purchase by claimant from said Davidson, he also bought the exemptions allowed by law to said bankrupt under the laws of the State of Alabama, and under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898. The amount of said exemption is one thousand dollars, which claimant, as such purchaser from said bankrupt, claims as exempt from any process for the payment of the debts of said bankrupt. Claimant claims all of said goods as his own under said purchase, as stated in his claim filed under the order of this court, on the 22nd day of December, 1898, but which was decided against him by this court on said date. And this answer is made without any prejudice to his claim to said goods, but as a part of the proceedings on his said propounded claim; that he has paid out of said sales for expenses of clerks, insurance and other necessary expenses the sum of three hundred and ten and $\frac{19}{100}$ dollars and returned twelve and $\frac{50}{100}$ dollars to purchasers, leaving a net balance of $1,434.80.

Respectfully submitted.

LOUIS BERNHEIMER.

UNITED STATES OF AMERICA,
Middle District of Alabama.

Louis Bernheimer, the above respondent, this day appeared before me, and made oath that he knows the contents of the above answer, and that the statements made therein are true.

LOUIS BERNHEIMER.

Sworn to and subscribed before me this 24th day of December, 1898.

HUGH NELSON,
Notary Public, Montgomery County, Alabama.

Filed Dec. 24, 1898, at 11.01 a. m.

J. W. DIMMICK, *Clerk.*

Demurrer to Claim of L. Bernheimer—Refiled to Answer to Rule.

In the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

13 A. C. BARLER MFG. CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

Come the petitioners and demur to the answer of L. Bernheimer, filed in this cause, in which the said Bernheimer propounds his claim to certain goods seized by the marshal of this court under a former order of this court, and for grounds of demurrer, assign the following:

1st. Because said answer fails to show any title to the said L. Bernheimer to the property in question which would be good as against the rights of these petitioning creditors.

2nd. Because said answer shows on its face that the said sale, alleged to have been made by the said H. C. Davidson, as assignee of the said D. Abraham, to the said L. Bernheimer, was made after the petition in this cause was filed and after this honorable court had acquired jurisdiction of the property in question.

3rd. Because it shows on its face that, at the time of the alleged sale from the said Davidson as assignee to the said L. Bernheimer, both the said Davidson as assignee, and the said L. Bernheimer had actual knowledge of the former filing of the original petition in this cause by your petitioners and of the proceedings thereon pending.

4th. Because the said L. Bernheimer attempts by and through said answer to show title in himself as paramount to the rights of these petitioning creditors of the said D. Abraham, by showing that he claims through a sale from H. C. Davidson as assignee to him and that the title of the said Davidson was acquired through a deed of assignment from the said D. Abraham to him, the said Davidson, which said deed of assignment was an act of bankruptcy under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898.

5th. Because the said L. Bernheimer attempts by and through said answer to claim title as paramount to the rights of these petitioning creditors to the property in question by showing that he claims through a certain deed of assignment, the making of which was an act of bankruptcy and void as to these petitioning creditors of the said D. Abraham.

6th. Because the said L. Bernheimer attempts by and through said answer to set up a superior title in a bankruptcy court
14 as against the petitioning creditors of one D. Abraham, by claiming through a deed of assignment from the said D. Abraham to one H. C. Davidson and a sale from the said Davidson to himself, and the answer shows on its face that the said Bernheimer

attempts to claim title through an instrument, the execution of which was an act of bankruptcy.

7th. Because the said answer of the said L. Bernheimer shows on its face that the said L. Bernheimer has no title to the property in question against the rights of these petitioning creditors.

8th. Because by and through said answer the said L. Bernheimer asks this honorable court to settle and decide certain questions between the said L. Bernheimer and the said H. C. Davidson as assignee, concerning certain dealings had between the two, and said answer and petition shows on its face that this court has not jurisdiction to try and determine the said questions.

Wherefore, etc.

G. F. MERTINS,
Attorney for Petitioning Creditors.

Filed December 22, 1898, at 10.30 a. m.
J. W. DIMMICK, *Clerk.*

Refiled December 24, 1898.
J. W. DIMMICK, *Clerk.*

Claim of L. Bernheimer.

In the United States District Court for the Middle District of Alabama, Sitting in Bankruptcy.

In re DAVID ABRAHAM, Bankrupt.

And now comes Louis Bernheimer and in obedience to the command of said court, issued on the 13th day of December, 1898, and served on said Bernheimer on said date, commanding him to appear before said court and propound his claim to the goods seized by the marshal of said court under a former order of said court in the said bankrupt proceedings, and propounds his claim thereto, as follows:

That on, to wit, the 29th day of October, 1898, the said David Abraham made a general assignment of all of his property, including said goods seized by said marshal, while in the possession of claimant, for the benefit of his creditors; that one H. C. Davidson was named as assignee under said assignment and was, by the term thereof, relieved of giving any bond as such; that on the 7th day of November, 1898, certain creditors of the said Abraham filed their petition in this court, asking that said Abraham be adjudged a bankrupt; that after said day and date the same creditors filed their petition in this court praying that said H. C. Davidson, as such assignee, be required to appear before said court and show cause why he should not be restrained from selling the said goods so assigned to him. That in obedience to the order issued by said court, said Davidson did appear before the said court, and showing cause satisfactory to the court, said rule was discharged, and said court declined to make the order prayed for restraining him from selling said goods on the ground that said petition was

not sworn to and no bond given, and said petition was dismissed without prejudice; that thereupon said Davidson, as such assignee, proceeded to sell said goods at public auction for cash in the city of Montgomery; that this claimant being advised by counsel learned in the law and who were perfectly conversant with all the facts in the case, bought the said goods from the said Davidson at and for the price of three thousand five hundred dollars, which was a fair, just and reasonable price therefor; that claimant paid the said Davidson, as such assignee, the full sum of three thousand five hundred dollars in cash for said goods and went into immediate possession thereof, and has been in the possession of the same until he was deprived thereof by the said marshal, under the orders of this court; that claimant never intended to interfere in any way with the process of this court or with any property of said bankrupt, but was advised that he was at liberty to purchase said property under the sale made by said Davidson; claimant represents to this honorable court that, if he is deprived of these goods and the said Davidson is allowed to keep the money paid him by claimant as the purchase price of said goods, claimant's position in the premises will be one of great hardship and loss to him; that under the terms of said assignment said Davidson will be compelled to pay the money paid by claimant to him for such goods to the creditors of the said Abraham, including the said creditors who petitioned to have said Abraham declared a bankrupt, and the consequences will be that both the goods which the complainant purchased, in perfect good faith and by advice of counsel, will be held and
16 sold again for the benefit of said creditors and the money which claimant paid for said goods will also be used and paid out for their benefit.

Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also, that, in default of such order, or if he is mistaken in the relief prayed for, that your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant, as purchase-money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods.

Respectfully submitted.

LOUIS BERNHEIMER.

UNITED STATES OF AMERICA,
State of Alabama, Montgomery County.

On this, the 20th day of December, 1898, personally appeared before me, Louis Bernheimer, the claimant in the above claim, who made solemn oath that he had read the foregoing claim and knows the contents thereof, and that the same is true, of his own knowledge.

LOUIS BERNHEIMER.

Sworn to and subscribed before me this, the 20th day of December, 1898.

HUGH NELSON,
Notary Public, Montgomery Co., Ala.

Filed Dec. 22, 1898, at 10.30 a. m.

J. W. DIMMICK, *Clerk.*

Order on Claim of L. Bernheimer.

In the United States District Court for the Middle District of Alabama. In Bankruptcy.

In re DAVID ABRAHAM, Bankrupt.

17 Claim of Louis Bernheimer to certain property and goods seized by the marshal under order of the court and to the proceeds of sales of certain other goods sold by said Bernheimer.

The matter of the claim of Louis Bernheimer to certain goods in the possession of the marshal of this court, and to the proceeds of the sales of other goods made by said Bernheimer, belonging to the estate of said bankrupt, coming on this day to be heard on the said claims and on the demurrers thereto filed by the petitioning creditors in said bankrupt proceedings; it is considered by the court that the said demurrers be, and the same are hereby, sustained, and the said Bernheimer declining to amend or plead further, and facts being made to appear to the satisfaction of the court, it is ordered, adjudged and decreed that the said Louis Bernheimer acquired no title to the said goods or to the proceeds of the sales thereof made by him under the purchase of said goods from H. C. Davidson, as assignee of said bankrupt, superior to the title of the creditors of said bankrupt's estate. It is further ordered that the said Louis Bernheimer pay over to the marshal of this court, to await the further orders of this court, all the proceeds of the sales (as may be ascertained by the referee and approved by the court as stated hereinafter), made by him of any of the goods purchased by him of said H. C. Davidson, as assignee of said bankrupt, D. Abraham. And that it be and is hereby referred to H. Booth, Esq., referee, to hold a reference giving all parties due notice and ascertain and report to this court the amount of such proceeds.

Dec. —, 1898.

JOHN BRUCE,
Judge of the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

Filed Dec. 24, 1898, at 11.30 a. m.

J. W. DIMMICK, *Clerk.*

Application and Order Granting Appeal and Supersedeas.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

In re DAVID ABRAHAM, Bankrupt.

Claim and intervention of Louis Bernheimer.

18 The above-named claimant and intervener, Louis Bernheimer, conceiving himself aggrieved by the order of the court, entered on the — day of December, 1898, in the above-entitled proceedings, doth hereby — appeal and supersedeas from said court's order to the circuit court of appeals of the United States for the fifth circuit, and he prays that his appeal and supersedeas may be allowed; and that a transcript of the record and proceedings, and papers upon which said order was made, duly authenticated, may be sent to the said circuit court of appeals for the fifth circuit of the United States.

GRAHAM & STEINER,
GORDON MACDONALD,
Attorneys for Claimant and Appellant.

And now, on December 24th, 1898, it is ordered that the appeal and supersedeas be allowed as prayed for.

JOHN BRUCE,
Judge of the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

Filed Dec. 24, 1898, at 11.20 a. m.

J. W. DIMMICK, *Clerk.*

Supersedeas Bond.

UNITED STATES OF AMERICA, }
Middle District of Alabama. }

In re DAVID ABRAHAM, Bankrupt.

Know all men by these presents, that we, Louis Bernheimer and National Surety Company, are held and firmly bound unto L. J. Bryan, as marshal of the middle district of Alabama, and to his successors in office, for the use of the creditors of the estate of D. Abraham, bankrupt, now being administered in said court, in the penal sum of eight thousand dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly, severally and firmly by these presents.

Sealed with our seals, and dated this 24th day of December, 1898.

The condition of this obligation is such, that whereas, on the

24th day of December, 1898, in the matter of the claims of
19 the above-bound Bernheimer to certain goods in the hands of the marshal of said court, seized by said marshal as the goods of said bankrupt estate, and to the proceeds of certain sales made by said Bernheimer of goods formerly the property of said bankrupt, a judgment was rendered by said district court, sitting in bankruptcy, against the said Bernheimer and adjudging that he had acquired no title to such goods and the proceeds of the sales thereof, as against the creditors of said bankrupt estate;

And whereas, the said Bernheimer has prayed for and taken an appeal and supersedeas from said judgment to the circuit court of appeals, which same has been granted on his entering into this bond, and the said property in the hands of said marshal has been turned over to said Bernheimer:

Now, therefore, if the said Louis Bernheimer shall prosecute the said appeal to effect, or failing therein, shall pay all costs and damages which any person may sustain by the said appeal, then this obligation shall be void, otherwise, to remain in full force and effect.

LOUIS BERNHEIMER. [L. S.]
NATIONAL SURETY CO. [L. S.]
ROB'T E. STEINER,
Resident Vice-President.

Attest: R. J. CHAMBERS,
Res'd't Ass't Sec'y.

Approved this 24th day of December, 1898.
JOHN BRUCE, *Judge.*

Filed Dec. 24, 1898, at 1.20 p. m.
J. W. DIMMICK, *Clerk.*

Assignment of Errors.

In the District Court of the Middle District of Alabama. In Bankruptcy.

In re D. ABRAHAM, Bankrupt.

L. BERNHEIMER, Intervener,
vs.
L. J. BRYAN, Marshal, etc.

To the Honorable John Bruce, judge of said court:

L. Bernheimer, the plaintiff and intervener in the above-
20 entitled proceedings, respectfully showeth unto your honor: That on, to wit, the 24th day of December, 1898, an order and judgment was made in said cause decreeing and adjudging that the said intervener and plaintiff had no title to the goods and to the proceeds of the asale of portion thereof, set out and described in said proceedings.

The said intervener having prayed an appeal as required by law from said order and judgment, to the United States circuit court of

appeals for the fifth circuit, and pray- for a reversal of said decree and submit- the following assignment of error:

1. The court erred in sustaining the first ground of demurrer to the claims of L. Bernheimer, intervener.
2. The court erred in sustaining the second ground of the demurrer to said claims.
3. The court erred in sustaining the third grounds of demurrers to said claims.
4. The court erred in sustaining the fourth grounds of demurrer to said claims.
5. The court erred in sustaining the fifth grounds of demurrer to said claims.
6. The court erred in sustaining the sixth ground of demurrer to said claims and answer.
7. The court erred in sustaining the seventh ground of demurrer to said claims.
8. The court erred in sustaining the eighth ground of demurrer to said claim and answer.
9. The court erred in rendering the order or judgment on said claims and answer as the same was rendered.

And the said intervener, L. Bernheimer, prays all necessary orders and process in the consideration and reversal of said order and judgment in the circuit court of appeals for the fifth circuit.

R. E. STEINER,
GORDON MACDONALD,
His Attorneys.

Filed Jan. 14, 1899, at 9.50 a. m.

J. W. DIMMICK, *Clerk.*

Citation.

The United States of America — L. J. Bryan, marshal, etc.:

You are hereby cited to be and appear before the United
21&22 States circuit court of appeals, at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to an order of appeal granted and filed in the clerk's office of the district court of the United States for the middle district of Alabama, wherein L. Bernheimer is appellant, and you are the appellee, to show cause, if any you have, why the judgment or order rendered against the appellant, as in said order of appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. John Bruce, judge of the district court of the United States, this 11th day of January, 1899.

JOHN BRUCE, *Judge.*

Service of the above citation is hereby accepted and further notice waived.

L. J. BRYAN,
Marshal, Appellee.

Filed Jan. 14, 1899, at 9.50 a. m.

J. W. DIMMICK, *Clerk.*

UNITED STATES OF AMERICA,
Middle District of Alabama, } ss:

I, J. W. Dimmick, clerk of the district court of the United States for the middle district of Alabama, hereby certify the foregoing pages numbered from one to twelve, inclusive, to contain a true and correct transcript of the proceedings touching the claim and intervention of L. Bernheimer, in the case of A. C. Barler Manufacturing Company, *et al. vs.* D. Abraham, bankrupt, as the same remain on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this the 16th day of January, A. D. 1899.

[SEAL.] J. W. DIMMICK, *Clerk.*

23 United States Circuit Court of Appeals for the Fifth Circuit.

In re D. ABRAHAM, Bankrupt.

LOUIS BERNHEIMER
versus
L. J. BRYAN, Marshal, etc. } No. 797.

Motion to Dismiss Appeal.

Filed February 9, 1899.

And now comes L. J. Bryan, marshal, etc., by G. F. Mertins, his attorney, and moves the court to dismiss the appeal herein, upon the following grounds, viz:

1. For that said order or decree so rendered on the twenty-fourth day of December, 1898, is not such a decree or "judgment" as may be appealed from to this court under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898.
2. For that said order so rendered is a summary order and not appealable to this court.

24 3. For that said order of decree is not a final decree, and is not appealable

4. For that the appeal to this court was allowed before any assignments or error ware filed in the court below.
5. For that no assignments of error were filed in the court below until after the time allowed by law for appeal had passed.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

Filed February 9, 1899.

(*Extract from Minutes.*)

L. BERNHEIMER
vs.
L. J. BRYAN, Marshal. } No. 797.

This cause was regularly called this day and submitted to the court after argument by Mr. Gordon Macdonald for appellant and by Mr. John D. Rouse and Mr. G. F. Mertins for appellees, on the merits as well as on the motion to dismiss.

November Term, 1898.

TUESDAY, *April* 25, 1899.

(*Extract from the Minutes.*)

L. BERNHEIMER, Appellant,
vs.
L. J. BRYAN, Marshal, etc., Appellee. } No. 797.

This cause came on to be heard on the transcript of the record from the district court of the United States for the middle district of Alabama, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said district court
25 in this cause be and the same is hereby reversed and this cause remanded to said district court, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the seventeenth day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in the opinion of this court rendered in this cause, and as equity may require.

Opinion.

Before Pardee and McCormick, circuit judges, and Parlange, district judge.

MCCORMICK, *Circuit Judge:*

On December 12, 1898, the following petition was presented to the district court of the United States for the middle district of Alabama, in bankruptcy:

"Your petitioners, the undersigned creditors of D. Abraham, the bankrupt in this cause, respectfully show unto your honor that heretofore, to wit, on the twelfth day of December, 1898 (same day), upon a petition heretofore filed by them in this cause, the said D.

Abraham was by this court adjudicated a bankrupt within the true intent and meaning of the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' That on, to wit, the twenty-ninth day of October, 1898, and prior to said adjudication, the said D. Abraham executed and delivered unto H. C. Davidson a deed of assignment by which he conveyed unto said Davidson all of his property and effects for the equal benefit of his creditors. That upon the delivery of said deed of assignment to him the said H. C. Davidson entered upon the execution of said trust. That afterward, as required by
26 the laws of the State of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee in the office of the register in chancery of Montgomery, Ala., by which inventory it is shown that the estate of the said D. Abraham consisted mainly of a stock of goods, wares, merchandise and book accounts located in a storehouse number 106 Dexter avenue. That appraisers were appointed by the said register in chancery to appraise said property; and in accordance with said appointment they accordingly appraised all the effects of the said D. Abraham, and made a return thereof to said chancery court; that the appraisement of said property as fixed by said appraisement is the sum of, to wit, $7,900.

"That on, to wit, the 7th day of November, 1898, your petitioners filed in this court their original petition praying that said Abraham be adjudicated a bankrupt upon the ground that he executed and delivered said deed of assignment, and, upon the filing of said petition in this court, your petitioners are advised by counsel, and therefore aver, that this court obtained jurisdiction over said estate of said Abraham, and it was the duty of the said H. C. Davidson, as assignee of said Abraham, to hold all of the property and effects of the said Abraham in his possession, subject to the orders and decrees of this court; but the said Davidson, disregarding the authority and jurisdiction of this court, proceeded to sell and dispose of said property, and did dispose of the same for a sum greatly less than the appraisement as made by said appraisers; that the purchasers of said property have been in possession of the said stock of goods, wares and merchandise for several days, selling and disposing of the same at retail trade, and at such prices as said purchasers claim to be bankrupt prices. Your peti-oners are informed and believe, and upon information aver and state, that said property was sold for greatly less than its value, and that
27 unless this court makes an order requiring that the said property be taken immediate possession of, your petitioners and all other creditors of the said Abraham will be greatly damaged thereby, and the *pro rata* share to which they are entitled out of the effects of the said D. Abraham will be greatly lessened.

"Your petitioners therefore pray that your honor make an order requiring L. J. Bryan, the marshal of the middle district of Alabama, to take charge of all the property and effects belonging to the said D. Abraham at the time of the making of his deed of assignment to the said H. C. Davidson, wherever the same may or can be

found, and further requiring the said H. C. Davidson to deliver to the said L. J. Bryan, as marshal, the books of accounts, papers, choses in action, and any other property or effects which may be in his possession belonging to the said D. Abraham, and further authorizing the said L. J. Bryan, as marshal, to take possession of all the property sold by the said H. C. Davidson, as assignee, to L. Bernheimer, or to any one else, and which is particularly located in said storehouse, known as No. 106 Dexter avenue, in the city of Montgomery, Alabama; and that the said L. J. Bryan, as marshal, be required to hold all of said property so coming into his possession until the further orders of this court."

On the foregoing petition, and on the same day it was presented, the court made the following order:

"The petition of A. C. Barler Manufacturing Company *et al.*, wherein they pray for an order in said cause, requiring L. J. Bryan, the marshal of the middle district of Alabama, to take possession of the property of the bankrupt in this case, coming on this day to be considered by the court; and it appearing from said petition that, after the filing of the original petition in this cause praying that said Abraham be adjudicated a bankrupt, H. C. Davidson, to
28 whom the said D. Abraham had before the filing of the original petition made a deed of assignment for the benefit of all of the said Abraham's creditors, did sell and dispose of certain property and effects of said D. Abraham for a sum greatly less than its value, and without any authority or direction from this court, and that said property is now in possession of the purchasers and being disposed of by them; and it further appearing to the court from said petition that the creditors of the said D. Abraham will be greatly damaged unless said property is taken possession of by this court; and it further appearing from said petition that it is necessary to the interest of the creditors of the said D. Abraham that this court take possession of all the property and effects of the said D. Abraham, now, therefore, it is the opinion of the court that said petition should be granted; and it is accordingly ordered, adjudged and decreed that L. J. Bryan, the marshal for the middle district of Alabama, take immediate possession of all the property and effects owned by the said D. Abraham at the time of the making of said deed of assignment, wherever the same may or can be found, and, further, that he demand and receive from H. C. Davidson as assignee, the books of accounts, papers, or any other effects of said Abraham which may be in the possession of the said Davidson as assignee, and, further, that he demand, receive, and take possession of all the property sold by the said Davidson as assignee to L. Bernheimer, or any one else, and which may now be particularly located in that certain storehouse on Dexter avenue, in the city of Montgomery, and known as No. 106; and that the said L. J. Bryan, as such marshal, hold all such property so coming into his possession until the further orders of this court."

Under this order, and on the same day, the marshal seized the stock of goods then in possession of Louis Bernheimer, the purchaser

at the assignee's sale; and on the marshal's report of the
29 seizure and his petition for instruction in reference to his disposition of the goods, the court on the next day, December 23, 1898, made the following order: "This cause coming on to be heard on the petition of the marshal for instructions in reference to goods seized by him under a former order of this court, and the same being considered by the court, it is ordered that Louis Bernheimer be notified to appear before this court within ten days from the date hereof, and propound any claim he has to the goods so seized, or to any part thereof, or failing therein that he will be decreed to have no claim or right thereto. The marshal is directed to retain possession of all said goods until further orders of this court. The clerk of this court will issue and cause to be served on said Bernheimer a copy of this order."

On December 17, 1898, the petitioning creditors submitted to the bankruptcy court the following:

"Your petitioners, the undersigned creditors of D. Abraham, respectfully show unto your honor that on, to wit, the 29th day of October, 1898, the said D. Abraham did make and deliver a deed of assignment to H. C. Davidson, who is a resident citizen of Montgomery city and county, and State of Alabama and district aforesaid. That thereafter, on, to wit, the 7th day of November, 1898, your petitioners did file in this honorable court a petition alleging that the said D. Abraham had committed an act of bankruptcy in executing said deed of assignment, and asked that the said D. Abraham be declared and adjudged a bankrupt under the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' That thereafter, to wit, on the 12th day of December, 1898, said petition coming on to be heard, after a consideration of the evidence the said D. Abraham was by this court duly adjudged a bankrupt within the meaning of said act, aforesaid.

30 "Your petitioners further show that, after the filing of their said petition in bankruptcy against the said D. Abraham, and in disregard of the proceedings therein pending, the said H. C. Davidson did, as your petitioners are informed and believe, on or about, to wit, the seventeenth day of November, 1898, turn over to and deliver to one L. Bernheimer all of the stock of goods which belonged to the estate of the said D. Abraham and which were located in storehouse No. 106 Dexter avenue, in the city of Montgomery, Alabama, said district aforesaid. That thereafter the said L. Bernheimer, who is a resident citizen of the city and county of Montgomery, State of Alabama, and said district aforesaid, did, in disregard of the proceedings pending in this court, proceed to sell, transfer, and deliver, largely for cash, said stock of goods as aforesaid. Your petitioners are informed, and upon such information show that the said stock of goods at the time the said Bernheimer took possession thereof was worth, to wit, the sum of about $10,000. Your petitioners are informed and believe, and upon such information show that the said L. Bernheimer sold large quantities of said goods while the same were in his possession, to wit, from November

17, 1898, up to and during December 12, 1898, when the balance of said stock was taken by an order of this court into the hands of the marshal of this court. Your petitioners are informed and believe that the said L. Bernheimer received from said sales and transfers of goods which belonged to the estate of said D. Abraham large sums of money. Your petitioners are informed and believe, and upon such information show that the said L. Bernheimer at the time he took possession of said stock of goods had knowledge of the proceedings in bankruptcy in this honorable court against the said D. Abraham. Your petitioners are advised by counsel, and upon such advice and information show that the said L. Bernheimer, as against these petitioners in bankruptcy, did not and could
31 not acquire title to the property of the said D. Abraham, and that said moneys so received by the said L. Bernheimer from sales and transfers of said property and goods belongs to the estate of the said D. Abraham, bankrupt.

"The premises considered, your petitioners pray that an order may be issued by this honorable court directed to said L. Bernheimer, calling on him to file with the referee in bankruptcy, on a day named, a sworn statement of all moneys which the said L. Bernheimer has received from the sale or transfer of said goods of D. Abraham, owned by him at the time of making his said deed of assignment, as well as such evidences of indebtedness as he may have received from any one for such sales, and that the said referee hold a reference to ascertain and report the correctness of such statement and await the further orders of this court."

The record sent up to us does not expressly show what order was made by the bankruptcy court on this last application of the petitioning creditors. It, however, sufficiently appears from the further action taken that an order was granted in conformity with the prayer.

On December 22, 1898, Bernheimer submitted to the court the following:

"And now comes Louis Bernheimer, and in obedience to the commands of said court issued on the 13th day of December, 1898, and served on said Bernheimer on said date, commanding him to appear before said court and propound his claim to the goods seized by the marshal of said court under a former order of said court in the said bankruptcy proceedings, and propounds his claim thereto as follows:

"That on, to wit, the 29th day of October, 1898, the said David Abraham made a general assignment of all of his property, including said goods seized by said marshal while in the possession
32 of claimant, for the benefit of his creditors; that one H. C. Davidson was named as assignee under said assignment, and was by the terms thereof relieved of giving any bond as such; that on the 7th day of November, 1898, certain creditors of the said Abraham filed their petition in this court asking that said Abraham be adjudged a bankrupt; that after said day and date the same creditors filed their petition in this court praying that said H. C. Davidson, as such assignee, be required to appear before said court

and show cause why he should not be restrained from selling the said goods so assigned to him. That, in obedience to the order issued by said court, said Davidson did appear before the said court, and showing cause satisfactory to the court, said rule was discharged, and said court declined to make the order prayed for restraining him from selling said goods on the ground that said petition was not sworn to and no bond given, and said petition was dismissed without prejudice; that thereupon said Davidson as such assignee proceeded to sell said goods at public auction for cash, in the city of Montgomery; that this claimant being advised by counsel learned in the law, and who were perfectly conversant with all the facts in the case, bought the said goods from the said Davidson at and for the price of three thousand five hundred dollars, which was a fair, just and reasonable price therefor; that claimant paid the said Davidson, as such assignee, the full sum of three thousand five hundred dollars in cash for said goods, and went into immediate possession thereof and has been in the possession of the same until he was deprived thereof by the said marshal under the orders of this court; that claimant never intended to interfere in any way with the process of this court or with any property of said bankrupt, but was advised that he was at liberty to purchase said property under the sale made by said Davidson. Claimant represents to this honorable court that if he is deprived of these goods, and if
33 the said Davidson is allowed to keep the money paid him by claimant as the purchase price of said goods, claimant's position in the premises will be one of great hardship and loss to him; that under the terms of said assignment said Davidson will be compelled to pay the money paid by claimant to him for such goods to the creditors of the said Abraham, including the said creditors who petitioned to have said Abraham declared a bankrupt, and the consequences will be that both the goods which the claimant purchased in perfect good faith and by advice of counsel will be held and sold again for the benefit of said creditors, and the money which claimant paid for said goods will also be used and paid out for their benefit.

"Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also that in default of such order, or if he is mistaken in the relief prayed for, that your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant as purchase-money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods."

On December 24, 1898, Bernheimer made further showing to the bankruptcy court as follows:

"Answer of L. Bernheimer, claimant, to petition requiring him to account for and turn over to the marshal proceeds of sale of certain goods, etc.

"The claimant, Louis Bernheimer, respectfully represents to the court that, as purchaser of the stock of goods formerly belonging to said bankrupt, under a sale thereof made by H. C. Davidson,
34 to whom said bankrupt had assigned said goods, he entered into the possession thereof; that while in such possession, and in the regular course of trade and before the marshal of this court in obedience to its order heretofore issued seized said goods, claimant sold a portion thereof, and received the proceeds of such sales; that the daily sales made by him of such goods were as follows: ——, amounting in the aggregate to two thousand seven hundred and sixty-eight dollars and forty cents; that at the time of the purchase by claimant from said Davidson he also bought the exemptions allowed by law to said bankrupt under the laws of the State of Alabama and under the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898. The amount of said exemption is one thousand dollars, which claimant as such purchaser from said bankrupt claims as exempt from any process for the payment of the debts of said bankrupt. Claimant claims all of said goods as his own under said purchase, as stated in his claim filed under the order of this court on the 22d day of December, 1898, but which was decided against him by this court on said date. And this answer is made without any prejudice to his claim to said goods, but as a part of the proceedings of his said propounded claim; that he has paid out of said sales for expenses of clerks, insurance, and other necessary expenses, the sum of three hundred and ten and $\frac{10}{100}$ dollars, and returned twelve and $\frac{50}{100}$ dollars to purchasers, leaving a net balance of $1,434.80."

To the showings or answers thus made by Bernheimer, the petitioning creditors demurred on the same day each was respectively filed, on the following grounds:

(1 and 7.) Because he shows no title to the property which would be good against their rights.

35 (2.) Because at the time of his alleged purchase the court of bankruptcy had acquired jurisdiction of the property.

(3.) Because at the time of the sale by the assignee, both the assignee and the purchaser had actual knowledge of the filing of the original petition of these petitioners and of the proceedings thereon pending.

(4, 5 and 6.) Because the making of the deed of assignment was as act of bankruptcy, void as to these petitioning creditors.

(8.) Because this court has no jurisdiction to try and determine questions between the assignee and the purchaser at the assignee's sale.

On December 24, 1898, the court of bankruptcy entered its decree as follows:

"The matter of the claim of Louis Bernheimer to certain goods

in the possession of the marshal of this court, and to the proceeds of the sales of other goods made by said Bernheimer belonging to the estate of said bankrupt, coming on this day to be heard on the said claims and on the demurrers thereto filed by the petitioning creditors in bankrupt proceedings, it is considered by the court that the said demurrers be and the same are hereby sustained; and the said Bernheimer declining to amend or plead further, and facts being made to appear to the satisfaction of the court, it is ordered, adjudged and decreed that the said Louis Bernheimer acquired no title to the said goods or to the proceeds of the sales thereof made by him under the purchase of said goods from H. C. Davidson as assignee of said bankrupt, superior to the title of the creditors of said bankrupt's estate. It is further ordered that the said Louis Bernheimer pay over to the marshal of this court, to await the further orders of this court, all the proceeds of the sales (as may be ascertained by the referee and approved by the court, as stated hereinafter) made by him of any of the goods purchased by him of said H. C. Davidson as assignee of said bankrupt, D. Abra-
36 ham. And that it be, and is hereby, referred to H. Booth, Esq., referee, to hold a reference, giving all parties due notice, and ascertain and report to this court the amount of such proceeds."

On the application and prayer of the purchaser, Bernheimer, for an appeal to the circuit court of appeals, and for the allowance of a supersedeas, the district court made the following order: "And now on December 24, 1898, it is ordered that the appeal and supersedeas be allowed as prayed for."

On the same day the judge approved the bond for appeal and supersedeas. The assignment of errors was filed on January 14, 1899.

McCormick, circuit judge, after stating the case as above, delivered the opinion of the court:

The assignment of errors is to the effect that the court erred in its rulings on the demurrers, and presents this question: Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him to appear before that court within ten days and propound any claim he had to the goods, or any part thereof; or, failing therein, that he be decreed to have no claim or right thereto?

The appellee moves to dismiss this appeal (1) because the decree sought thereby to be reviewed is not such a judgment as may be appealed from under the provisions of the bankrupt act; (2) that the order or decree sought to be reviewed is a summary order and not appealable to this court; (3) that the order or decree is not a final decree; and, for that reason, is not appealable.

By the first section of the bankrupt act of 1867, the district courts were constituted courts of bankruptcy, and were given
37 original jurisdiction in all matters and proceedings in bankruptcy, which jurisdiction they were authorized to exer-

cise as well in vacation as in term time, and it was made to extend to all cases and controversies arising between the bankrupt and any creditor or creditors who claimed any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. To which was added by the act of 22d of June, 1874, that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount.

By the second section the several circuit courts of the United States were given a general superintendence and jurisdiction of all cases and questions arising under the act, and were authorized upon bill, petition, or other proper process of any party aggrieved, to hear and determine the case as a court of equity, except when special provision is otherwise made in the act. This power and jurisdiction was to be exercised either by the court or by any justice thereof, in term time or vacation. The circuit courts were also given concurrent jurisdiction with the district courts of all suits at law or in equity brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person
38 against the assignee, touching any property or rights of property of the bankrupt, transferable or vested in such assignee.

This last provision as amended by the act of June 22, 1874, now appears as sec. 4979 in the Revised Statutes.

By sec. 8 it was provided that appeals may be taken to the circuit courts in all cases in equity, and writs of error may be allowed from the circuit courts to the district courts in cases at law under the jurisdiction created by the bankrupt act when the debt or damage claimed amounted to more than five hundred dollars; and any supposed creditor whose claim was wholly or in part rejected, or an assignee who was dissatisfied with the allowance of a claim, could appeal from the decision of the district court to the circuit court, on certain terms, conditions, and limitations not necessary to notice here.

By sec. 9 it was provided that in cases arising under the act, no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed $2,000. (Amended by act of February 6, 1875, so as to read $5,000.)

At the time of the passage of this act, the conditions in this

country were unprecedented. The immense proportions of the civil war, the suspension of specie payments, the volume of paper currency issued by the National Treasury and national banks, the large disbursements by Government, the destruction by abolition of property in slaves in the fifteen States which had theretofore recognized such property in so many millions of colored people, the throes of reconstruction, and the morbid activity which the liberated energy of more than a million veteran soldiers, with faculties quickened and strung to the highest key by the intensity of the protracted civil strife had stimulated and for a time sustained, had brought our commercial interests to that agonizing crisis of almost universal bankruptcy, which raised a clamor for speedy liquidation.
39 To meet these transcendent conditions, the provisions of the act of 1867 went beyond the terms of any previous law.

When the courts of bankruptcy were opened the office of circuit judge had not been re-established. The dockets of the Supreme Court were large and growing, and severely taxed the time and strength of the circuit justices. Their residence at the national capital then rendered them more remote from and more difficult to be reached by parties to bankruptcy proceedings than it would now. They could visit each district, at the most, once only in every two years for such brief period and labors as their service on the Supreme Bench then permitted. On the tenth day of April, 1869, the office of circuit judge in each of the nine circuits was re-established, and in due time filled by appointment. Thereafter the general superintendence of the circuit court became more efficient, and the jurisdiction of those courts on appeal or writ of error acquired more practical value and was more invoked. Immediately upon the taking effect of the act the dockets of the courts of bankruptcy became crowded. The most able and careful judges of the district court, pressed by urgent conditions and argument, with little call or time to doubt, began to extend summary process and proceedings so as to meet all individual cases presented. The growing weight of precedent thus nourished by their own practically unreviewable, or actually unreviewed decisions carried their jurisdiction to that point where a few years later it became burdensome and dangerous to all persons engaged in agricultural, manufacturing, or commercial pursuits and dealing to any considerable extent on credit. By the aid of the court of bankruptcy, or without its aid, the efforts of individuals to better their position in trade and other industries caused a strong reaction to set in, and the conditions which had excused and rendered tolerable the exercise of exorbitant jurisdiction
40 by the courts of bankruptcy began to disappear. Commercial transactions acquired a more healthy tone. With some variableness of symptoms, and occasional relapses more or less severe, the country was steadily recovering and approaching specie payment and a sound normal basis of dealing and credit. The summary processes and proceedings in bankruptcy were no longer so much needed or used for the relief of honest debtors or the protection of creditors against the fraudulent dealings of dishonest insolvents, but came to be used rather for the too rigorous enforce-

ment of collections against honest and substantially solvent but temporarily embarrassed dealers. Provision had been made for the resumption of specie payments to take effect on January 1, 1879. On the seventh day of June, 1878, Congress passed an act which repealed the bankrupt law, to take effect on September 1, 1878.

Thereupon varying insolvent laws, embracing more or less bankruptcy features, were restored or established in most of the different States. The force of the bankruptcy features of these laws was, of necessity, limited in its operation to the territory of the respective States, except so far as it could be and was extended by the consent of the creditors. It soon became apparent that the country had substantial need of a national act to establish a uniform system of bankruptcy throughout the United States. Strenuous efforts began to be made both in and out of Congress to secure such action on its part as would meet this need. Numerous bills were drawn with elaborate care, studiously constructed on the lines of the previous law and the decisions under it. It was attempted to frame a bill that would be permanent in its beneficial operation, adjust itself to the varying conditions of trade, and be free from all oppressive features or needless rigor. This effort was maintained in Congress from session to session, but the recollection of the effect of
41 summary proceedings in bankruptcy under the act of 1877 was so vivid and repugnant that it prevented or delayed for a period of twenty years the action of Congress so much needed and so urgently sought.

Some cogent reasons combined or coincided to lead the judges of the courts of bankruptcy to take and hold liberal views as to the extent of their jurisdiction in matters of bankruptcy. More than in other matters this jurisdiction appeared to be the jurisdiction of the judge, as distinguished from that of the court. In these matters there seemed to be little room, if any, for such distinction. At any point within his district, and at any time, in term time or vacation, in open court or in chambers, he was authorized to exercise this jurisdiction to an extent and in a manner well calculated to evolve the unconscious or conscious thought that he was the court of bankruptcy. The judge of the court of bankruptcy not only presided alone in the district court in the exercise of all the other jurisdiction of that court, but he could, and generally did preside alone in the circuit court and exercise all the original jurisdiction of that court, except its jurisdiction to take, on due application, a general superintendence of all cases and questions arising in the courts of bankruptcy under the bankrupt act. Thus, where original jurisdiction in bankruptcy proceedings could be conducted in a summary manner the exercise of such jurisdiction was exclusively his, and in all matters affecting the bankrupt's estate, in which legal proceedings were required to be by plenary suit or action when the same were pending in the circuit court, he could, and in actual practice generally did, preside alone. His action in these plenary causes in the circuit court could only be reviewed by the Supreme Court, and by it only in such cases as involved a matter of sufficient amount in value to support an appeal or writ of error. From many

of the districts the Supreme Court was very far away in point
42 of distance; and whether far or near, the day at which it could reach and decide a case on appeal or writ of error was indefinitely remote. Therefore parties and counsel were reasonably inclined to acquiesce in the views of the judge of the court of bankruptcy, even where they were not (as they oftener were than otherwise) interested, and urgent to extend his jurisdiction to meet the exigencies of the case they had or represented. However, after the lapse of some years cases began to reach the dockets of the Supreme Court. And after the substantial final settlement by the subordinate courts of the great bulk of the business that arose under the act, the Supreme Court began to reach the cases on its dockets which involved the construction of the act, and to announce decisions marking the boundaries of the jurisdiction it conferred, and the manner of procedure in its exercise. These decisions settled that most matters and proceedings in bankruptcy were to be heard and adjudicated in a summary way, but that the general jurisdiction thus to proceed did not extend to controversies by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of the bankrupt transferred to or vested in the assignee; that such controversies, where they could not be settled otherwise than by legal proceedings could be prosecuted only by plenary suits at law or in equity. Smith *vs.* Mason, 81 U. S. (14 Wall.), 419, December term, 1871. Of these plenary suits the circuit courts were given concurrent jurisdiction with the district courts of the same district. This language of sec. 2 necessarily implies, either that the district court had jurisdiction in such matters under the general grant in sec. 1, or it confers such jurisdiction on that court. It was held in Goodall *vs.* Tuttle (7 B. R., 193), that sec. 2 did not confer it. It seems also to imply that only the circuit courts and the district courts had
43 original jurisdiction in such cases. It doubtless so appeared to the commissioners who prepared the revision of the statutes of the United States, and to the committees of Congress which examined the same before it was adopted by an act approved June 22, 1874, for in sec. 711 of the revision it is declared: "The jurisdiction vested in the courts of the United States in cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States; * * * sixth, of all matters and proceedings in bankruptcy." And in the act of June 22, 1874, amending the act of 1867 it was, as we have seen, deemed necessary to provide that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount. The reason for this provision doubtless was that the general original jurisdiction of the Federal courts was limited to controversies involving matter in value to the amount of five hundred dollars or more.

In one case decided at the October term, 1875, it was assumed in the opinion of the court, that the State courts, may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts which had vested in the assignee in bankruptcy. Lathrop *vs.* Drake, 91 U. S., 516. At the same term it was held that the jurisdiction conferred upon the Federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest that of the State courts in suits of which they had full cognizance. Eyster *vs.* Gaff, 91 U. S., 521.

As highly instructive and pertinent to our inquiry, we quote some of the language of the opinion in the case last cited:

44 "The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

"The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts."

The same questions were involved in other cases pending in the Supreme Court, and at the next term (October term, 1876), were elaborately argued by counsel, closely scrutinized by the court, and fully discussed in its opinion prepared and delivered by the same judge who had been the organ of the court in delivering its opinion in Lathrop *vs.* Drake, and the doctrine which was assumed in the opinion in that case, and which was distinctly held in Eyster *vs.* Gaff was adhered to; and the general principle was announced,

45 that where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever by their own constitution they are competent to take it (Claflin *vs.* Houseman, 93 U. S., 130).

By the second section of the act of July 1, 1898, the district courts as courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation in chambers and during

their respective terms, to * * * (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

It is provided by sec. 23:

"*a*. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

"*b*. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By sec. 67*e* it is provided that all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the pro-
46 visions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid, shall, if he be adjudged a bankrupt and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings, or otherwise, for the benefit of the creditors.

It is provided by sec. 26*a*: "The trustee may, pursuant to the directions of the court, submit to arbitration any controversy arising in the settlement of the estate." Sec. 27*a*: "The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

By clause (3) of sec. 2 the courts of bankruptcy have authority to "appoint receivers or the marshals upon application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." * * *

By clause (3*e*) it is provided: "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or

applicant shall file in the same court a bond with at least two
47 good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner the respondent or respondents shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

Section 69*a* provides: "A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect his property, that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold its subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained."

Trustees are vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt; with exceptions not necessary to notice. (Section 70.)

Trustees thus vested with title are charged to collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expedi-
tiously as is compatible with the best interest of the parties
48 in interest (sec. 47*a*, clause 2). And receivers or the marshal may be appointed to discharge the duties of trustees until trustees are appointed.

We have thus grouped together the provisions of the present law which appear to bear on the subject of our inquiry. We have noticed in the opening part of this opinion the extensive and apparently exclusive jurisdiction that was given by the act of 1867 to the national courts over the subject of proceedings in bankruptcy and of cases arising out of such proceedings. Under the present act, if the bankrupt has his principal place of business, resides or has his domicile in the United States, the adjudication of his bankruptcy and the proceedings therein must be in the district where he has so had his principal place of business, his residence or his domicile for the preceding six months or the greater portion thereof. The general rule is that a person can be sued in the United States courts only in the district whereof he is an inhabitant, and no suit can be brought in those courts unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. It is therefore apparent that, as a general rule, all controversies at law

and in equity, as distinguished from proceedings in bankruptcy between trustees as such (or other duly appointed and empowered representatives of the bankrupt's estate) and adverse claimants concerning the property acquired or claimed by the trustees (or other duly appointed and empowered representatives of the estate), which cannot be or are not adjusted by negotiation, arbitration or compromise, must be abandoned by the trustees or adjudicated in the State courts, unless by consent of the proposed defendant suit can be brought in a United States court.

If we concede or assume that the making of a deed of general assignment within four months of the adjudication in bankruptcy, which by the express terms of the law is an act of bank-
49 ruptcy, wholly invalidates the deed so that no title can pass thereby as against the grantor's creditors, no matter what may be its terms or the avowed and apparent intent of the parties as shown by the deed (a concession which we are not now prepared to make, and do not make except for the purpose of the argument), the property and assets thereby attempted to be conveyed are precisely such assets and estate as it is made the duty of the trustee to recover and reclaim "by legal proceedings or otherwise." Whatever the words "or otherwise" may embrace, it can hardly be seriously contended that they embrace such summary proceedings in bankruptcy as the issuance of a special warrant to the marshal to seize the goods, and the service of a rule upon the claimant to come before the court of bankruptcy and render an account and make restitution for the value of any portion of such goods so attempted to be transferred to him which have been sold or otherwise disposed of by him. Such a construction would render more than nugatory surplusage the language "by legal proceedings." If, therefore, we were restricted in our view to the terms of section 67*e*, it would clearly appear therefrom that "by legal proceedings" must be intended controversies at law and in equity, as distinguished from proceedings in bankruptcy. But our view is not limited to the terms of section 67*e*.

Conceding that the deed of assignment is invalid, and that no title passed to the assignee, or from him to the adverse claimant as against the grantor's creditors, then such title as the bankrupt had at the time of making the assignment vested fully in the trustee, and might, and doubtless often would be surrendered to him on demand. If such demand was refused, the act itself, as we have seen, provides for arbitration or compromise of the controversy. If these fail and resort must be had to legal proceedings, the adverse claimant is entitled to his day in court, and in that court in which
50 the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery, in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him. He would have a right to sue and to show, if he could, that title did not pass by the making and delivery of the deed. That is precisely what the trustee has to show, or, to state it more guardedly, the converse of that is precisely what the adverse claimant has the right to try to show,

namely, that title did pass to him under the deed and by the subsequent action of the assignee.

As already intimated, no question as to the validity or invalidity of the title of Bernheimer to the goods which he claims to have acquired from the assignee under the deed of assignment is now before us, or in any manner to be concluded or affected by what we decide, or what we say in deciding the question of law that we are considering and which we stated at the opening of this opinion to be, Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods, and a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the district courts, as courts of bankruptcy, were not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction.

We are now to consider more directly the questions presented by the motion to dismiss.

By the act to establish circuit courts of appeals, this court has appellate jurisdiction to review by appeal, or by writ of error, final decision in the district courts in all cases other than those in which
appeals or writs of error may be taken direct to the Supreme
51 Court unless otherwise provided by law. Appeals may also be taken to this court in the same cases from certain interlocutory orders or decrees rendered by the district court.

By sec. 25*a* of the present bankruptcy law appeals may be taken in equity cases in bankruptcy proceedings from the courts of bankruptcy to this court in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge, and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by this court in term time or vacation, as the case may be.

The judgment, order or decree appealed from in this case is not embraced in either of the three classes of cases as just recited from the statute. It was not rendered on an original independent bill in equity, nor in a proceeding ancillary thereto. If considered in reference alone to its terms, its provisions for being put into immediate execution, if not in effect self-executing, give it the elements of a final decree within the statutes and decisions under which appeals are taken from decrees in ancillary proceedings in an equity suit.

We do not, however, consider it necessary in this case to decide whether an appeal can be taken from that judgment as from a final decree in equity.

Sec. 24*b* provides: "The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power

shall be exercised on due notice and petition by any party aggrieved."

The second section of the act of 1867 provided that the sev-
52 eral circuit courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under the act, and, except when special provision is otherwise made, may, upon bill, petition or other proper process of any party aggrieved, hear and determine the case as a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof, in term time or vacation. By sec. 8 of that act it was provided that appeals may be taken from the district court to the circuit court in four classes of cases named, but that no appeal shall be allowed unless it is claimed and notice given thereof within ten days after the entry of the decree or decision appealed from.

In a case presented to the circuit court in which Chief Justice Chase was at the time presiding, it appeared that certain judgments or orders were rendered by the district court on the 16th of March, 1869; that the petitioners, as soon as these orders came to their knowledge, prayed an appeal in the name and with the approval of the assignees, and immediately gave notice of their appeal. The time for filing the bond on appeal was extended by the order of the district judge until the 18th of April, and on the 14th an order was passed showing that the assignees had filed their bond in the penalty of $10,000. On the 6th of May, the assignees informed the counsel for the petitioners that they would not allow the use of their names in the prosecution of this appeal. "The petitioners therefore ask (the date of presenting their petition does not appear in the opinion) in consideration of the surprise occasioned to them by this information, and also upon the ground that no appeal from the order of the district judge in such a case as that before him is allowed by the act, that the court will give them leave to file their petition now presented and grant them appropriate relief." The Chief Justice reviewed the provisions of the statute, and held
53 that the order mentioned in the petition was one from which no appeal could be taken, and drew the inevitable conclusion "that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all." He then proceeds to discuss the power of general superintendence conferred on the circuit courts, and concludes his review thereof thus: "The exercise of this general jurisdiction is not placed by the act under specific regulations and restriction like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulation to the discretion of the court and to the rules to be prescribed by the Supreme Court. As yet the Supreme Court has prescribed no rule concerning it, nor has this court." Leave was granted to file the petition. *In re* Alexander, Third Bankruptcy Register, p. 6.

The general orders in bankruptcy adopted and established by the Supreme Court "under the powers conferred by the Constitution

and laws on the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,'" prescribe no rules or forms to guide or govern the exercise of this jurisdiction by the circuit court of appeals. If we may, or should, establish some rule or rules to regulate the same, we have not done so. In this connection we again quote the language of Chief Justice Chase in the case last cited: "In the case before us its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed; nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated."

In the exercise of this discretion we must, of course, keep in view the terms of the statute. It declares that the jurisdiction is
54 in equity, that it is either interlocutory or final, and to be exercised only in matter of law. It prescribes no mode other than that it shall be on due notice and petition of any party aggrieved. In the general orders in bankruptcy above referred to there are both rules and forms for the framing of petitions, but they relate to petitions as defined in section 1, clause (20), which reads: "'Petition' shall mean a paper filed in a court of bankruptcy with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named." The words "due notice" do not prescribe the time or manner of giving the notice or the parties to whom it is to be given.

All the courts which are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings are authorized to exercise their jurisdiction in term time or vacation, as the case may be. By rule 36 of general orders in bankruptcy it is provided that "appeals from a court of bankruptcy to a circuit court of appeals * * * shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."

The right of appeal as given by the statute can neither be enlarged or restricted by the district court or by this court. The regulation of appeals is a regulation of jurisdiction. It was not without purpose, therefore, that the exercise of the superintending jurisdiction of this court is not placed by the act under specific regulations and restrictions like the proceeding by appeal or writ of error.

It seems clear to us, from a consideration of the various provisions of the act, and particularly of the clause conferring superintending and revising jurisdiction on this court, that it was the in-
55 tent of Congress that the exercise of such jurisdiction could be easily invoked by any party aggrieved, and should be freely exerted by the circuit courts of appeals without the hindrance of technical trammels. In the analogy to the rule prescribed for allowing appeals, and to the practice in allowing writs

of error in cases at law, the petition for revision may be presented to and allowed by a judge of the court of bankruptcy or any one of the judges of this court. It should with reasonable clearness show the action of the court which it seeks to have revised in matter of law, and reasonable notice thereof should be given to the adverse party. The appeal prayed for, allowed and perfected in this case, bringing up, as it does, the record of the pleadings, which present all the facts, either verified by the petitioning creditors, whom the appellee represents and cannot be allowed to dispute, or averred by Bernheimer and admitted by the demurrer, showing all of the action of the judge thereon, including the last order from which the appeal was taken, may embrace more than it was necessary to put into a petition for revision, but it clearly does embrace a sufficient statement of the facts and action of the court thereon sought to be revised in matter of law. No question has been raised or can be raised as to the sufficiency of the notice. It is apparent from the proceedings that the appeal was prayed for and allowed in open court in the presence of all the parties or their attorneys, at the very instant that the judgment sought to be revised was announced. They thus had, or must be charged with due notice. We conclude that the motion to dismiss the proceedings in this court should not be granted.

We could, did we deem it necessary, permit the party aggrieved now to file his petition for the revision he seeks, and, upon due or reasonable notice thereof being given to all parties entitled thereto, proceed thereon in the exercise of our jurisdiction. We have not deemed it necessary or meet in this case to have resort to
56 that course, but have proceeded to consider the case on its merits in like manner as if a formal petition had been presented and due notice thereof given. We may not feel justified in exercising our discretion to the same extent in all cases which may be brought to us in the future. The proceedings in this case in the district court were had before the general orders in bankruptcy took effect or had been widely published and become generally known to parties or counsel, or the judges of the inferior courts. The provisions of the act with reference to appeals to this court and to obtaining the superintendence and revision it may exercise are in a measure new, and precedents under the former law, if they were uniform (which they are not), could not be safely followed.

It appears from the record that the deed of assignment to Davidson was executed and delivered on October 29, 1898; that the assignee at once entered upon the execution of the trust, and, as required by the laws of the State of Alabama, filed in the proper State court an inventory of the property, which consisted mainly of the stock of goods in controversy in this proceeding, and appraisers were duly appointed, who appraised all the effects covered by the assignment and made return thereof to the State court; that on November 7, certain creditors of Abraham filed their petition in the court of bankrupt-y, praying that Abraham be adjudged a bankrupt; that thereafter the same creditors filed another petition in that court praying that Davidson be required to appear before

the court and show cause why he should not be restrained from selling the goods so assigned to him; that in obedience to this order he did appear and show cause satisfactory to the court; that the rule against him was discharged, and the court declining to grant the restraining order, on the ground that the petition therefor was not sworn to nor any bond given, dismissed the petition without prejudice; that thereupon Davidson, as
57 assignee, proceeded to sell the goods for cash in the city of Montgomery; that Bernheimer bought the same for the price of $3,500, which he paid in cash, and went into immediate possession of the goods, on November 17; that, claiming to be the purchaser and owner of the goods, Bernheimer proceeded from day to day to sell portions of the same in the regular course of business from November 17 up to and during December 12; that on December 12 the marshal seized under the special warrant on that day issued out of the court of bankruptcy that portion of the goods still remaining in Bernheimer's possession; that during the time Bernheimer was in the possession of the stock of goods he made sales thereof to the gross amount in value received therefor of $2,768.40; that at the time of his purchase from Davidson, Bernheimer bought from Abraham the exemptions allowed by the law of Alabama, the State of the bankrupt's domicile, amounting to the sum of $1,000; that during the time Bernheimer was making sale of the goods purchased from Davidson he paid out for clerks, insurance, and other necessary expenses, the sum of $310.10, and returned to purchasers the sum of $12.50; that these three sums, $1,000 paid the bankrupt for his exemptions, the $310.10, and the $12.50, aggregating $1,322.60, leave a net balance of cash received by him from the sale of the goods purchased and received from Davidson of $1,445.80; that the goods seized are now in the custody of the marshal (the appellee), held for the benefit of creditors.

The application of the petitioning creditors for the special warrant obtained in this case, having been made on the same day, but after Abraham was adjudged a bankrupt, does not bring them within the letter of sec. 3*e*, nor of sec. 69*a*, the provisions whereof do not, therefore, literally denounce against them the penalty therein prescribed for wrongfully obtaining thereunder the seizure of the property of an alleged bankrupt; but, in the light of
58 the construction which should be placed, and which we have placed on the provisions of the bankrupt law, their application for the writ to seize, and the seizure thereunder of the goods in controversy, was a flagrant violation of those provisions. Therefore, upon adjudging, as we do, that their application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he should be allowed all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses and damages to be fixed and allowed by the court of bankruptcy and to be paid by the petitioning creditors; to secure the payment

whereof Bernheimer should be allowed a lien on whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is our duty to prevent the springing up of a practice that will extend summary process and proceedings in bankruptcy to controversies between trustees or other parties to the bankruptcy proceedings and adverse claimants. Under the act of 1867 such a practice was prevalent in many quarters at one time, but it rested on opinions taking a view of the provisions of that act against which, as we have seen, the Supreme Court steadily set its face. As we construe the provisions of the present law, they not only do not admit of such a view or authorize such a practice, but carefully guard against it and forbid it.

It is ordered and decreed that the order, judgment and decree appealed from, rendered on December 24, 1898, be and the same is hereby reversed; and the cause is remanded to the district court sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant,
Louis Bernheimer, on the seventeenth day of December,
59 1898, to vacate all orders made thereon, and to restore to the
said Louis Bernheimer the goods taken from his possesion, and thereafter proceed in accordance with the views expressed in this opinion and as equity may require.

Dissenting Opinion.

PARLANGE, *District Judge:*

The matter which the record in this case presents for decision is whether the creditors of the bankrupt could proceed summarily in the court of bankruptcy, to compel the purchaser at the sale of the bankrupt's property by the assignee, to deliver the property or its proceeds to the court of bankruptcy. Incidentally the right of the purchaser to appeal to this court is contested.

I concur fully in the conclusion reached by this court on the matters just stated, and which are, in my opinion, the only matters before this court for decision. The able and exhaustive opinion of the court shows that the court of bankruptcy was devoid of jurisdiction when proceeding against the purchaser as it did, and that the State court is the proper forum to settle the dispute between the purchaser at the assignee's sale and the bankrupt's creditors.

The opinion of this court also shows that the purchaser, in coming to this court, mistook his remedy. It is clear that he should have proceeded by petition and not by appeal. I agree fully that the indulgence of this court in treating, of its own motion, the appeal as a petition, is just and proper for the reasons stated in the court's opinion.

But I am constrained to dissent as to the intimation that the court of bankruptcy could not have taken possession of the bankrupt's estate, prior to the sale and while it was in the hands of the assignee; and I must further dissent from the direction to the court of bankruptcy to proceed to decree damages, counsel fees and cost against the creditors.

60 The question whether a court of bankruptcy has power to take the bankrupt's property from his assignee is not before this court. The courts of appeals for the second and eighth circuits have, without a dissent, held that the court of bankruptcy may take the property from the assignee and both courts referred, in their own able opinions, to the equally able opinion of Judge Brown (*In re* Gutwillig, 90 F. R., 475). The will of Congress in matters of bankruptcy is paramount. On such a subject a State statute could not prevail; and it is difficult to comprehend how an individual may defeat, or even impede, the will of Congress. The assignee is the bankrupt's agent. I do not see how the court of bankruptcy is deprived of power over the bankrupt's property because it is found in the hands of the bankrupt's agent.

Be this as it may, it seems to me that the case before the court does not call in any manner for an opinion on the point, and that it would be wiser to defer a determination concerning it until it should come up as a contested issue.

It also seems to me that the court of bankruptcy should not be directed to proceed to impose damages, counsel fees and costs on the creditors. There is no such demand before us, neither in the pleadings nor in the briefs. Litigants are usually careful to ask for all that they believe themselves entitled to or that there is any probability of their recovering. They often ask too much, and very seldom, if ever, ask too little. While I agree fully, as has already been stated, that a proper indulgence has been shown the appellant in view of the inevitable uncertainty attendant upon the putting into operation of a new and complex law, I believe that some indulgence should also be shown the creditors, or at least this court should not be so rigorous toward them as to impose upon them damages, etc., which have not been asked for.

61 I do not understand this court to hold that creditors cannot recover the bankruptcy property or its proceeds from the purchaser. This court holds that such recovery cannot be had by summary proceedings in the court of bankruptcy. It is evident that this court would not undertake to say what the State should decide if a suit is brought there to recover the property or its proceeds from the purchaser. It may be that the State court will take the view that the sale is voidable.

Sec. 69 and sec. 3*e*, referred to in the opinion of the court, both relate to bonds given to secure an alleged bankrupt against damages which may result to him from the seizure of his property. Neither section is intended to secure a person situated as is the purchaser in this case. No bond was given under either section. The bankrupt is not complaining of damages to his property. If bonds had been given under either of the sections just mentioned, he alone could have availed himself of them.

Furthermore, I am far from being certain that the court of bankruptcy has jurisdiction to try the question of damages. As the court of bankruptcy has no jurisdiction to entertain the proceeding of the creditors, it is difficult to see how that court has jurisdiction to inflict damages in that same matter. The Supreme Court has

said that a court which has no jurisdiction of a case cannot even award costs or order execution for them to issue. Mayor *vs.* Cooper, 6 Wall., 247; Smith *vs.* Whitney, 116 U. S., 175; Elk *vs.* Wilkins, 112 U. S., 98.

Under the very views so very ably expressed by this court as to the restricted powers of the court of bankruptcy. I have grave doubt, to say the least, with regard to the power of the court of bankruptcy to cause to be framed and to determine an issue between the creditors and the purchaser as to the damages.

62 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing seventy pages, numbered from *a* to 69, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court in the case of *In re* D. Abraham, bankrupt; Louis Bernheimer, appellant, *vs.* L. J. Bryan, marshal, for use of creditors, No. 797, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this eighth day of November, A. D. 1899.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

63 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Louis Bernheimer is appellant and L. J. Bryan, marshal, &c., is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the middle district of Alabama, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do
64 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

65 [Endorsed:] Supreme Court of the United States. No. 297. October term, 1899. L. J. Bryan, marshal, &c., *vs.* Louis Bernheimer. Writ of certiorari. Received Nov. 4, 1899. J. M. McKee, cl'k.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

In obedience to the command of the within writ and by direction of the judges of the United States circuit court of appeals for the fifth circuit, I, J. M. McKee, clerk of said court, do, as a return to said writ, hereby transmit to the honorable the Supreme Court of the United States a true, full, and perfect transcript of the record and all proceedings had in said court in the cause wherein Louis Bernheimer was appellant and L. J. Bryan, marshal, &c., was appellee, as fully and completely as the same remains of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said United States circuit court of appeals for the fifth circuit, at the city of New Orleans, this November 8th, 1899.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No., 17,411. Supreme Court U. S., October term, 1899. Term No., 297. L. J. Bryan, as marshal for the use of creditors, petitioner, *vs.* Louis Bernheimer. Writ of certiorari and return. Filed November 13th, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. ——.

EX PARTE L. J. BRYAN, AS MARSHAL, FOR THE USE OF CREDITORS, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF LOUIS BERNHEIMER, APPELLANT, VS. L. J. BRYAN, AS MARSHAL, ETC., RESPONDENT, No. 797.

To the Honorable the Chief Justice and the Associate Justices of Said Court:

The petition of L. J. Bryan as marshal respectfully shows:

1. That your petitioner is a citizen of Alabama and is Marshal for the United States District Court for the Middle District of Alabama.

2. That on the 29th day of October, 1898, one D. Abraham, residing in the city of Montgomery and State of Alabama, and being engaged in the crockery business, made a general assignment of his stock of goods to one H. C. Davidson, for the benefit of his creditors. That at the time of making said deed of assignment the said Abra-

ham was largely indebted for merchandise bought by him and for other things.

3. That thereafter, on the 7th day of November, 1898, A. C. Barler Manufacturing Company, an Illinois corporation and a creditor of said D. Abraham, did, together with certain other creditors of the said Abraham in number and with debts in the amount required by law, file a petition in involuntary bankruptcy against the said Abraham in the District Court of the United States for the Middle District of Alabama, sitting in bankruptcy, under and in accordance with the provisions of an act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, alleging the execution of said deed of general assignment as an act of bankruptcy and petitioning said District Court to adjudicate the said D. Abraham a bankrupt and to administer his estate in the manner prescribed by law under said act of Congress. That a copy of said petition and a summons was forthwith served on said Abraham.

4. That thereafter, on the seventeenth day of November, 1898, the said H. C. Davidson, assignee, did transfer and deliver said stock of goods, which was worth in value $10,000 and upward, to one Louis Bernheimer, a citizen of the city of Montgomery and State of Alabama, at private sale, the said Louis Bernheimer claiming to have bought the same for himself and to have paid the said Davidson the sum of $3500 therefor.

5. That at the time of the said transfer from the said Davidson to the said Bernheimer, both the said Davidson and the said Bernheimer had actual knowledge of the former filing of the petition in involuntary bankruptcy against the said D. Abraham, and of the proceedings thereupon pending. That said Bernheimer immedately took possession of said stock of goods and began to dispose of same as a "Bankrupt Sale."

6. That the said D. Abraham was, on the twelfth day of December, 1898, duly adjudged a bankrupt under those proceedings formerly filed against him under the act of Congress aforesaid.

That thereafter, and on the same day, said petitioning creditors filed a petition in said District Court (see Record, p. 4) alleging the facts aforesaid and the interference of said Louis Bernheimer with the jurisdiction of said District Court, that he was dissipating said property and praying that this petitioner, as marshal, as provided for in said act as aforesaid, be required to take said property into his possession and to hold the same until the further orders of said court. That an order was issued to petitioner as prayed for by said creditors and petitioner took charge of what remained of said property. That on the following day a notice was issued by said District Court *ex mero motu* to the said Louis Bernheimer, to come into court within ten days and propound his claim, if any he had, to said goods.

7. That said petitioning creditors, A. C. Barler Manufacturing Company *et al.*, on the seventeenth day of December, 1898, filed another petition in said District Court, asking that the said Louis Bernheimer be required to account to said Court for the moneys received by him from the sales of said goods while the stock was in his possession, and an order was issued by said District Court as prayed for (see Record, p. 8).

8. That thereafter, on December 22, 1898, the said Louis Bernheimer came into said District Court and filed his claim to said goods, and on December 24, 1898, he filed an answer to the notice to account, showing what he claimed to have been his sales during the time the property was in his possession, praying that his claim and his answer be considered together, submitting his claim to the Court in that behalf, alleging that he had a good title,

and asking the said District Court to adjudicate his rights (see Record, p. 14).

9. That the said A. C. Barler Manufacturing Company *et al.*, petitioning creditors, filed in said Court eight demurrers to said claim and answer (see Record, p. 12). That the said District Court sustained said demurrers, and the said Bernheimer declining to plead further, the said District Court did, on the twenty-fourth day of December, 1898, enter up a judgment sustaining said demurrers and ordering a reference to determine the amount of sales made by Bernheimer (see Record, p. 16). That said Louis Bernheimer thereupon executed a bond in the sum of $8000, and prayed for an appeal and supersedeas to the Circuit Court of Appeals for the Fifth Circuit, which was granted (see Record, p. 17). That said Bernheimer filed said bond in said District Court, and said property was by your petitioner released and returned to the said Bernheimer forthwith, and has been in his possession ever since.

10. That on his said appeal the said Bernheimer alleged as error the sustaining of the demurrers and the rendition of the judgment as the same was rendered (see Record, p. 19). That in said Circuit Court of Appeals, your petitioner, for the use of creditors, being made respondent, filed a motion to dismiss said appeal, alleging five separate grounds therefor (see Record, p. 22).

11. That in said Circuit Court of Appeals said case was docketed as follows: "*In re* D. Abraham, Bankrupt; Louis Bernheimer, Appellant, vs. L. J. Bryan, Marshal for the use of Creditors, Appellee;" and was entered as No. 797. That said case was argued and submitted in said Circuit Court of Appeals on February 9, 1899.

12. That on, to-wit: April 25, 1899, the said Circuit Court of Appeals rendered an opinion and judgment in favor of said Bernheimer and against your petitioner, as follows:

"Did the District Court as a court of bankruptcy have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods, and a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the District Court, as courts of bankruptcy, are not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction." (See Record, p. —.) "Therefore, judging, as we do, that their (the creditors') application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he (Bernheimer) should be allowed all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses and damages to be fixed and allowed by the court of bankruptcy and to be paid by the petitioning creditors; to secure the payment whereof Bernheimer should be allowed a lien upon whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is ordered and decreed that the order, judgment and decree appealed from, rendered on December 24, 1898, be and the same is hereby reversed, and the cause is remanded to the District Court sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the seventeenth day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in this opinion and as equity may require."

The opinion was rendered by McCormick and concurred in by Pardee, circuit judge. Judge Parlange

filed a dissenting opinion to that part awarding costs, damages, etc., against the petitioning creditors. A certified copy of the entire record of said case in the Circuit Court of Appeals is hereto annexed as part of this application, in conformity with rule 37 of this Honorable Court.

13. That the Circuit Court of Appeals decided that the District Court had no jurisdiction to try and determine Bernheimer's title, and nevertheless directs the said District Court to award Bernheimer damages for the taking and detention of the property; that the District Court can not undertake to award Bernheimer damages for the detention and taking of the property until it first determines whether Bernheimer has a good title to the property. If he had no title he was not injured; that the Circuit Court of Appeals thus in effect decided that the District Court did and did not have jurisdiction to determine the title to the property.

14. That the Circuit Court of Appeals for the eighth circuit in the case of *Davis vs. Bohle et al.*, in Bankruptcy, decided (Federal Reporter, Vol. 92, Advance Sheets No. 2, p. 325) that a deed of general assignment is avoided by an adjudication in bankruptcy of the assignor when a petition is filed against him alleging the execution of such an instrument, and that the District Court in which the petition was filed may, under the provisions of the act, order the marshal of that Court to take possession of the property assigned and hold the same until a trustee is appointed. That the Circuit Court of Appeals for the second circuit in the case of *In re* Gutwillig, Fed. Rep., Vol. 92, Advance Sheets No. 2, p. 337, decided that the deed of assignment is void as against proceedings in bankauptcy instituted within four months. That the decision of the Circuit Court of Appeals for the fifth circuit in this case is in conflict with said decisions in the Circuit Courts of Appeal for the second and eighth circuits and also in conflict with the express provisions of the bankrupt act of

1898 directing District Courts to appoint receivers or marshal to take charge of the property of bankrupts where they should find it necessary.

15. That it is essential for a uniform construction and administration of the bankrupt act throughout the United States that this Honorable Court construe such parts of the bankrupt act of 1898 as relate to this case, reconcile or set at rest the conflicting opinions in regard to the same and decide the rights of your petitioner and the creditors of D. Abraham.

16. Your petitioner respectfully represents to this Honorable Court that no appeal is allowed him to this Court under the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States" approved July 1, 1898, and that his only remedy is by petition for a writ of certiorari under Sec. 25, subdivision *d* of said act.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in the said case entitled "*In re* D. Abraham, Bankrupt. Louis Bernheimer, Appellant, vs. L. J. Bryan, Marshal, for the Use of Creditors, Appellee, No. 797" to the end that the said cause may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An Act to establish Circuit Courts of Appeal, and to define and to regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and as provided under Section 25, subdivision *d*, of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, or that your

petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with said acts and that the said judgment of the circuit court of appeals in said case, and every part thereof, may be reversed by this Honorable Court..

Wherefore your petitioner will ever pray, etc.

L. J. BRYAN, *Marshal*,
by G. F. MERTINS,
Attorney and Counselor for Petitioner.

J. D. ROUSE,
WM. GRANT,
Of Counsel for Petitioner.

STATE OF ALABAMA, }
COUNTY OF MONTGOMERY. }

G. F. Mertins, being duly sworn, says that he is one of the attorneys and of counsel for L. J. Bryan, marshal, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the District Court of the United States for the Middle District of Alabama and in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true, to the best of his information and belief.

(Signed) G. F. MERTINS,

Subscribed and sworn to before me this the twelfth day of May, A. D. 1899.

(Signed) LEON WEIL,
Notary Public, Montgomery Co., Ala.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, Chapter 3, Section 3, provides that, "Acts of bankruptcy by a person shall consist of his having (Subdivision 4) made a general assignment for the benefit of his creditors."

Such an instrument when made within four months prior to the filing of a petition in bankruptcy against the party making it, is a fraud upon the act and is made with intent to "hinder delay and defraud his creditors," since its necessary effect is to defeat the operation of the act and the rights of creditors to such an administration of the assets as that act provides, and is therefore void, as against his subsequently appointed trustee in bankruptcy and the petitioning creditors.

In re Gutwillig, C. C. A., Second Circuit, Fed. Rep., Vol. 92, Advance Sheets No. 2, p. 337.

Davis vs. Bohle et al., C. C. A., Eighth Circuit, Fed. Rep., Vol. 92, Advance sheets No. 2, p. 325.

The bankrupt act of 1898 is the only act which has ever provided in terms that the making of a general assignment should be an act of bankruptcy for the making of which the assignor might be adjudged a bankrupt, but the courts, under the act of 1841 and the act of 1867 decided generally that such a conveyance was voidable because the effect of it was to defeat the operation of the act.

Globe Insurance Company vs. Cleveland Insurance Company, 14 B. R. Register, 311.

After the property had been taken from Bernheimer by your petitioner upon the petition of the creditors and the order of the Court thereon, the Court *ex mero motu* issued an order to Bernheimer to come within ten days and propound any claim that he might have to the goods. Bern-

heimer filed his claim or petition and his answer setting up his claim of title, and without filing a plea to the jurisdiction of the Court, "submitted his claim to the Court in that behalf." The petitioning creditors demurred to his claim and answer. The validity *vel non* of the deed of general assignment from Abraham to Davidson, and the transfer to Bernheimer from Davidson, in the case at bar, as against the petitioning creditors, was, under the demurrers, the only question before the District Court. No question of jurisdiction was raised. The Circuit Court of Appeals, having considered the appeal of Bernheimer, to which he had no shadow of right under the act, as a petition for a writ of certiorari, failed and refused to decide this question. although it was before it.

The petitioning creditors in this case, within eight days of the filing of the deed of general assignment, viz., on November 7, 1898, filed their petition alleging the execution of the instrument and asking that the assignor be adjudged a bankrupt and his property be administered by the bankrupt court. The two cases above cited, *In re* Gutwillig and Davis vs Bohle *et al.*, and a long list of decisions of the District Courts all over the country, hold that such an instrument, as against the petitioning creditors, is void. They could not hold otherwise, for there can be no controversy as to the meaning of Sec. 3, subdivision, of the act. The purpose of the act would be defeated entirely.

The bankrupt court has under Sec. 2, subdivision 7 of the act, original jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as herein otherwise provided."

It would be a strange spectacle that of a bankrupt court adjudging a man a bankrupt for the execution of a deed of general assignment and then being forced to sit idle while the assignee administers the estate, dissipates it and

squanders it, with no checks on him whatever, and then finally to grant that bankrupt a discharge. Abraham's general assignment was void as to the creditors in bankruptcy, and the District Court alone had the right to administer the estate.

The second proposition is whether the District Court had the power to dispossess Bernheimer of the property in the manner in which it was done.

The act of 1898 provides, Sec. 2, subdivision 3, that the courts of bankruptcy shall have original jurisdiction to "appoint receivers or the marshals, upon application of parties in interest, in case the Court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

This general provision is qualified by another provision following later, Sec. 3, subdivision *e*, as follows: "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alledged bankrupt, or any part of the same *prior to the adjudication and pending a hearing upon the petition*, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or judge thereof in such sum as the court shall direct," etc.

The first provision allows this to be done at any time after the filing of the petition, but the second provision qualifies it by providing that if it is done before the adjudication, there must be a bond.

Must the property necessarily be in the hands of the bankrupt? The act does not so provide. It simply says the "property of the bankrupt." The two cases, *In re* Gutwillig and Davis vs. Bohle et al., above cited, hold that it may be taken away from the assignee of a bankrupt un-

der these provisions when the bankrupt has made a general assignment.

In the case of Sharpe vs. Doyle, 102 U. S. 686, cited also and approved in the case of Feibelman vs. Packard, 109 U. S. 421, the defendant in error cited the cases of Smith vs. Mason, 14 Wall. 419, and Marshall vs. Knox, 16 Wall. 551. Bernheimer on his appeal cited the cases of Smith vs. Mason and Marshall vs. Knox and relied on them to show that the property could not be taken from him summarily.

We will say in the beginning that Smith vs. Mason and Marshall vs. Knox differ materially from the case at bar in that in those cases the property had been transferred long before proceedings in bankruptcy were instituted, while here the property was in the hands of Davidson, Abraham's agent, when the proceedings were instituted and Bernheimer was simply meddling and interfering with the jurisdiction of the District Court.

Mr. Justice Miller, in Sharpe vs. Doyle, in delivering the opinion of the court, said: "The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee (trustee), a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitously conveyed beyond the reach of the court of the assignee (trustee), to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceeding, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods, or remove them beyond the reach of the assignee (trustee) or the process of the court, and defy the law. The evidence in this case shows the man-

ner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt, would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee (trustee) is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee (trustee) when appointed, as a sufficient reason for failing to take possession of it."

The petition and order in this case in the District Court sitting in bankruptcy, and of which Bernheimer complains, was a proceeding for a vindication of the control of Abraham's property by the Court.

Bernheimer took possession of the property after the petition in bankruptcy had been filed and, as he states in his answer, with actual knowledge of the former filing of the petition and of the proceedings thereupon pending and after consulting with counsel "learned in the law, and who were perfectly conversant with all the facts in the case."

Even if he purchased for himself and with his own money, there was no *bona fides* in that transaction. He

stands in just the same position as Davidson would have stood had the petition been directed against him.

In the case of Bank vs. Sherman, 101 U. S. 403, Mr. Justice Swayne, for the Court, said: "The filing of the petition was a caveat to all the world. It was in effect an attachment and an injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor, they revived and were in full force. If it were against him, they were extinguished as to him and vested in the assignee (trustee) for the purposes of the trust with which he was charged. The bankrupt became, as it were, *civilitur mortuus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee (trustee) is in all respects just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise, the efficacy of the act depended not upon its own language and meaning, but was only what others outside of the proceeding might permit it to be. This would be a solecism and largely defeat the purpose of the statute and the policy of Congress in enacting it."

The bankruptcy act of 1898, provides, that the bankrupt court shall have original jurisdiction, Sec. 2, subdivision 7, to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided," and under subdivision 15, same section, to "make such orders, issue such process and enter such judgments in addition to those specifically provided

for as may be necessary for the enforcement of the provisions of this act" and under subdivision 6 "bring in and substitute additional parties or persons in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy," and lastly "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 23, subdivision (b) provides that "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

But it seems clear to us that the suits referred to in this section and article were based on causes of action vested in the bankrupt prior to the surrender, which were transmitted to the estate by the assignment. As to these it may be conceded that the trustee must resort to the court which would have had jurisdiction of the action it brought by the bankrupt. The action, however, to recover assets unlawfully concealed or assigned, is not denied from the bankrupt, but invested in the creditors through their trustee, by statute, and jurisdiction to enforce it is necessiarly invested in the court which is charged with the administration of the estate.

Bernheimer contends, and the Circuit Court of Appeals upholds him in his contention, that the petitioning creditors should have waited until a trustee should be elected, and then have that trustee go into the State Court and bring a formal suit against him for the property because of Sec. 23 of the act.

When the creditors filed their petition asking that this petitioner be required to take the property into his possession, Abraham had just been adjudicated a bankrupt, and there was no one to bring a formal suit. Under Sec. 23

rights or action accrued to the bankrupt from property passed to the trustee, as to which he becomes a new party, but in the same forum; and mere rights of action might accrue to the trustee from his course of administration to which that provision might and should properly apply. But the assets of the bankrupt are brought by the proceedings within the reach and control and subject to the orders of the Court, and no one has a right to remove or meddle with them but for their preservation without leave of the Court except the trustee.

The Circuit Court of Appeals argues that summary proceedings are not looked upon with favor by this Honorable Court. The contention is doubtless a proper one, but it surely can not apply where a person meddles with the administration of the estate in the bankrupt Court while that Court is proceeding with the administration in the manner laid down by congress. The very act itself, Sec. 29, subdivision (b), No. 4, makes it a crime for any person to receive "any material amount of property from a bankrupt after the filing of the petition, with the intent to defeat this act." Davidson, the assignee, was simply Abraham's agent; he had no more title to the property than Abraham had.

The right is given the bankrupt Court through its marshal to take charge of the property, and besides, to make such orders and issue such process as may be necessary for the preservation of the property, and when Bernheimer, during the proceedings, with actual knowledge, attempts and does actually snatch the estate away in spite of and in defiance of the bankrupt Court, whether for himself or others, surely he can not be heard to say or to complain that the manner of wresting it from him, though in accordance with the law, does not suit his personal convenience. It is to be supposed that he would have preferred that the District Court should wait until the trustee should be elected snd then let the trustee bring a

formal suit in the State Court, which might not come up for months afterward, when he could mock the attempts of the trustee to prove the articles composing and the value of a stock of goods which had been scattered to the four winds, and which he had never seen.

The decisions in *In re* Gutwillig and in Davis vs. Bohle and in Sharpe vs. Doyle, above cited, are in accordance with the letter and the spirit of the law. The reasoning is sound and any other construction of the law would make the courts utterly impotent to carry out the provisions of the bankrupt law.

The Circuit Court of Appeals in this case says that the District Court had no jurisdiction whatever to try and determiue Bernheimer's title to the property. We contend that under the Sec. 2 above cited, it had full power to do so and that original jurisdiction was given it. It then orders the District Court to fix and allow to Bernheimer "all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him (Bernheimer), they to be "paid by the petitioning creditors."

How can the District Court fix and allow such damages for the taking and detention of this property until it first determines whether Bernheimer had a good title to the property? If he had no right to the property, he was not damaged by the taking and detention and the petitioning creditors would have a right to require Bernheimer to prove in the District Court first of all things, that the property belongs to him. The Circuit Court of Appeals says that the District Court can not do this and yet it proceeds to direct it to do so.

The right of the petitioning creditors to require this proof has been fully decided in this Court in the cases of Sharpe vs. Doyle, 102 U. S. 686, and in Feibelman vs. Packard, 109 U. S. 421, both cited above. Surely, surely this can not stand.

This Honorable Court has said that a court which has no jurisdiction of a case can not even award costs or order execution for them to issue.

Mayor vs. Cooper, 6 Wall. 247.

Smith vs. Whitney, 116 U. S. 175.

Elk vs. Wilkins, 112 U. S. 98.

Judge Parlange, in his opinion dissenting from that portion of the opinion of the Circuit Court of Appeals, which awards these costs, damages, etc., cited these cases.

Granted, for the sake of argument, that the District Court did not have the power to try Bernheimer's title on the notice issued to him *ex mero motu* by the Court to come in and propound his title, why should the Circuit Court of Appeals dismiss the petition of the creditors and the order thereon which was in nowise connected with that notice when the power and right to ask for that order is given them by the act and the power to issue the order is given to the Court?

We earnestly and respectfully contend that the action of the District Court, sitting in bankruptcy, was in all things proper, and respectfully pray that the judgment of the Circuit Court of Appeals in this case, and every part thereof, may be reversed by this Honorable Court.

Respectfully submitted,

J. D. ROUSE,

WILLIAM GRANT,

Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1908

No. 325

L. J. BUTLER, as Marshal, etc.,

Petitioner,

vs.

LOUIS EBENHEIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of Gustave F. Mellen, John D. Rouse and William Grant, Counsel for L. J. Butler, etc., Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 297.

L. J. BRYAN, AS MARSHAL, FOR THE USE OF CREDITORS, *Petitioner.*

vs.

LOUIS BERNHEIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of Gustave F. Mertins, John D. Rouse and William Grant, Counsel for L. J. Bryan, etc., Petitioner.

STATEMENT.

The facts are briefly as follows: On October 29th, 1898, one D. Abraham, a wholesale crockery merchant, residing in the City of Montgomery, Alabama, and having a stock of goods and merchandise worth $10,000.00 and upwards, executed a deed of general assignment to one H. C. Davidson as Assignee, for the benefit of his creditors. The said instrument was delivered to the said Davidson who accepted said trust, and the same was on said day filed for record in the office of the Probate Judge of Montgomery County, Alabama.

Thereafter, on the 7th day of November, 1898, certain creditors of the said D. Abraham, in number and with debts to the amount required by law, filed an involuntary petition in bankruptcy against the said D. Abraham in the District Court of the United States for the Middle District of Alabama, sitting in Bankruptcy, al-

leging the execution and delivery of said deed of general assignment to be an Act of Bankruptcy under the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, and asking that the said D. Abraham be adjudged a bankrupt and that his property be distributed according to law, and that such further proceedings be had thereon as the law in such cases provides.

Service was duly and forthwith had upon the said D. Abraham in the manner prescribed by law, and, upon the 12th day of December, 1898, the said D. Abraham was by said court adjudged a bankrupt within the purview of said act.

After the said involuntary petition was filed and service had, the said H. C. Davidson, as assignee, with actual knowledge of the proceedings then pending, transferred the stock of goods which had been assigned to him, at private sale to one Louis Bernheimer, who also had actual knowledge of said proceedings, the said Bernheimer claiming to buy the same and to pay therefor the sum of $3,500.00. Bernheimer entered into possession of said goods about the day the same was transferred to him, viz: on the 17th day of November, 1898, and immediately began to rapidly dispose of the same at what he called a "Bankrupt Sale."

On the 12th day of December, 1898, immediately after the adjudication, the petitioning creditors filed a petition in the District Court (see Record, p. 4), alleging the facts aforesaid and the interference of the said Bernheimer with the jurisdiction of said District Court, that he was dissipating said property, and praying that your petitioner L. J. Bryan, as Marshal, as provided for in said act, be required to take said property into his possession and to hold the same until the further orders

of said Court. An order was issued to your petitioner as prayed for by said creditors (see Record, p. 6), and your petitioner took charge of what remained of said property. On the following day a notice was issued by said District Court *ex mero motu* to the said Louis Bernheimer, to come into court within ten days and propound his claim, if any he had, to said goods. (Record, p. 7.)

On the 17th day of December, 1898, the petitioning creditors, A. C. Barler Manufacturing Co., *et al.*, filed another petition in said District Court, asking that the said Louis Bernheimer be required to account to said Court for the moneys received by him from the sale of goods while the stock was in his possession and while he was conducting his so-called "Bankrupt Sale" (Record, p. 7) and an order was issued by said District Court as prayed for.

On December 22nd, thereafter, the said Louis Bernheimer came into said District Court and filed a claim to said goods (Record, p. 14) and on December 24th, he filed his answer to the notice to account, (Record, p. 9), showing what he claimed had been his sales during the time the property was in his possession. He prayed that his claim and answer might be considered together, made of them a petition and submitted his rights to the court for adjudication, alleging that he had acquired a good title to the property.

The said A. C. Barler Manufacturing Co. et al., petitioning creditors, filed in said court eight demurrers to said claim and answer (Record, p. 11). The said District Court sustained said demurrers, and the said Bernheimer declining to plead further, the said District Court did, on the 24th day of December, 1898, enter up a judgment sustaining said demurrers and ordering a reference to determine the amount of sales made by the said Bernheimer (Record, p. 14).

Bernheimer thereafter executed a bond in the sum of $8,000.00 and prayed for an appeal and supersedeas to the Circuit Court of Appeals for the Fifth Circuit, which was granted (Record p. 15). Bernheimer filed said bond in said District Court and the same being approved, said property was by your petitioner released and returned to the said Bernheimer and has been disposed of by him.

On said appeal, the said Bernheimer assigned as error the sustaining of the demurrers and the redition of the judgment as the same was rendered (Record, p. 16). In said Circuit Court of Appeals, your petitioner, for the use of creditors, being made respondent, filed a motion to dismiss said appeal, alleging five separate grounds therefor (Record, p. 18).

In said Circuit Court of Appeals, said cause was docketed as follows: "*In re* D. Abraham, Bankrupt; Louis Bernheimer, Appellant, v. L. J. Bryan, Marshal, for the Use of Creditors, Appellee;" and was entered as "No. 797." Said cause was on the 9th day of February, 1899, argued and submitted upon the merits as well as upon the motion to dismiss in said Circuit Court of Appeals.

On April 25th, 1899, the Circuit Court of Appeals rendered an opinion and judgment in favor of said Bernheimer and against your petitioner as follows: "Did the District Court as a court of bankruptcy have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods and a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the District Courts as courts of bankruptcy, are not invested with jurisdiction to proceed in that way in cases such as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction." "Therefore, judging as we do, that their (the credi-

tors') application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he (Bernheimer) should be allowed all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses and damages to be fixed and allowed by the court of bankruptcy and to be paid by the petitioning creditors; to secure the payment whereof Bernheimer should be allowed a lien upon whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is ordered and decreed that the order, judgment and decree appealed from, rendered on December 24th, 1898, be and the same is hereby reversed, and the cause is remanded to the District Court, sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the 17th day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in this opinion and as equity may require."

The opinion was rendered by McCormick and concurred in by Pardee, Circuit Judge. Judge Parlange filed a dissenting opinion to that part awarding costs, damages, counsel fees, expenses, etc., against the petitioning creditors.

A petition for a writ of certiorari to be directed to said Circuit Court of Appeals for the Fifth Circuit was filed by your petitioner in this honorable court and the same was granted and the writ was issued on to-wit: October 24th, 1899.

The petitioner makes the following Assignment of Errors:

1. The Court of Appeals erred in refusing to dismiss the appeal for the reasons assigned in the motion of the appellee (Record, p. 18).

2. Said Court erred in holding that the order of the District Court requiring the Marshal to seize the goods of the bankrupt, and that the seizure thereof, was unwarranted and unlawful.

3. Said Court erred in holding that the District Court, as a Court of Bankruptcy, was without jurisdiction to take possession of the property of the bankrupt, and adjudicate upon the title of the claimant thereto.

4. Said Court erred in holding that the District Court, as a Court of Bankruptcy, was without jurisdiction to adjudicate the claim interposed by Bernheimer, to the goods seized by the Marshal under its order.

5. Said court erred in reversing the judgment of the District Court, and in instructing said Court to dismiss the petition of the creditors, vacate all orders thereon and restore to said Bernheimer the goods taken from his possession.

6. Said court erred in holding that the claimant be allowed all costs, counsel fees, and damages occasioned by the seizure and detention of the goods in question, and in directing the amount thereof to be fixed by the District Court, and paid by petitioning creditors.

Argument.

Your petitioner is informed that in his brief to be presented to this Honorable Court, Bernheimer calls attention to endorsements on certain of the petitions and orders filed in the District Court, alleging in his brief that the orders were endorsed "filed" as of a few minutes before the petitions on these orders were endorsed "filed." **The orders refer to the petitions, which had been filed**

before and taken together, the error, if any, is corrected by the documents themselves. The Courts do not recognize parts of a day except in cases where different and adverse proceedings are filed against the same property. The documents themselves show by reference to each other that if such an endorsement was made, that the same was simply a clerical error and it could only be taken advantage of by some third party.

The Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, Chapter 3, Section 3, provides that "Acts of Bankruptcy by a person shall consist of his having (Subdivision 4) made a general assignment for the benefit of his creditors."

It has been decided by this honorable court that "a deed of assignment for the benefit of creditors is made by the Bankruptcy Act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor."

West Company v. Lea, 174 U. S. Rep., 590.

The validity *vel non*, of the deed of assignment from Abraham to Davidson and the transfer from Davidson to Bernheimer, was, under the demurrers, the only question before the District Court. No question of jurisdiction was raised. Bernheimer's answer and claim, which he prayed might be taken and considered together, was in the nature of a petition and he made himself a party to the proceedings. The question of the jurisdiction of the District Court to try the title to the property, seems to have come into the case without being anywhere raised in the pleading and only after the case was in the hands of the Circuit Court of Appeals.

The cases of *In re*, Gutwillig, 92 Fed. Rep,, 337, and Davis v. Bohle *et al.*, 92 Fed. Rep., 325, and a long list of decisions of the District Courts all over the country, hold that a deed of assignment made within four months

before the filing of an involuntary petition in bankruptcy, is void as against the petitioning creditors.

The filing of an involuntary petition in bankruptcy, is a proceeding *in rem*, in which the *res* or estate is in *custodia legis*.

In re. Anderson, 23 Fed. Rep. 482.
Carter v. Hobbs, 92 Fed. Rep. 597.

The Bankruptcy Act of 1898 provides that the Courts of Bankruptcy "are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms." And subdivision 7, section 2 to "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto except as herein otherwise provided." And under subdivision 15 to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." And under subdivision 6 to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy." And lastly—"nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

A review of the section necessarily compels the conclusion that except where expressly excepted, Congress intended to clothe the District Courts with the most ample powers to conduct and settle all matters in bankruptcy.

This section also provides, subdivision 3, that the courts of bankruptcy shall have original jurisdiction to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take

charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified."

This general provision is qualified by another provision folowing later, section 3, subdivision *c*, as follows: "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt or any part of the same prior to the adjudication and pending a hearing upon the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of court, to be approved by the court or judge thereof in such sum as the court shall direct," etc.

The first and general provision allows the property to be taken into actual possession at any time after the filing of the petition, but the second provision qualifies it by providing that if this is done before the adjudication, there must be a bond.

Section 23 provides, subdivision *a* "The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from bankruptcy proceedings, between trustees as such and adverse claimants concerning property acquired or claimed by the trustees, in the same manner and to the same extent only as though proceedings in bankruptcy had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

Subdivision *b*.—"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By Section 67 *e*, it is provided that "all conveyances, transfers, assignments or incumbrances of his property or any part thereof, made or given by a person adjudged

a bankrupt under the provisions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against creditors of such debtor except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid, shall, if he be adjudged a bankrupt and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise, for the benefit of the creditors."

If the property had been in the actual possession of Abraham, there could be no question as to the right of the District Court to take possession of the same by petition and order as provided for in Sections 2 and 3 of the act. Bernheimer was not dignified with the name of "adverse claimant" except in the Court of Appeals.

Must the property necessarily be in the hands of the bankrupt? The act does not so provide. It simply says "the property of the bankrupt." The two cases above cited, viz: *In re.* Gutwillig and Davis v. Bohle *et al.*, hold that it may be taken away from the assignee of a bankrupt under these provisions when the bankrupt has made a general assignment.

In the case of Sharpe v. Doyle, 102 U. S. 686, cited also and approved in the case of Feibelman v. Packard, 109 U. S. 421, the defendant in error cited the cases of Smith v. Mason, 14 Wall. 419, and Marshall v. Knox, 16 Wall. 551. Bernheimer on his appeal cited the cases of Smith v. Mason and Marshall v. Knox and relied on them to show that the property could not be taken from him summarily.

The cases of Smith v. Mason and Marshall v. Knox differ materially from the case at bar in that in those cases the property had been transferred long before proceedings in bankruptcy were instituted, while here the property was in the hands of Davidson, Abraham's agent, when the proceedings were instituted. Both parties had actual knowledge of the proceedings pending and the transfer was nothing more or less than an attempt to get the property out of the reach of the District Court. Bernheimer's holding was simply a meddling and interfering with the jurisdiction of the District Court.

Mr. Justice Miller, in Sharpe v. Doyle, cited above, in delivering the opinion of the Court, said: "The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee (trustee), a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court of the assignee (trustee), to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceeding, he can, with the aid of *friends* or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee (trustee) or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that as soon

as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt, would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee (trustee) is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee (trustee) when appointed, as a sufficient reason for failing to take possession of it."

The petition and order in this case in the District Court was a proceeding for the vindication of the control of Abraham's property by the court. The notice to Bernheimer to come in and propound such claims as he might have to the goods and the action thereon seems to have been a proceeding to quiet the title to the property and to give Bernheimer an opportunity to be heard and it was fully authorized by Section 2 of the act.

In the case of Bank v. Shearman, 101 U. S. 403, Mr. Justice Swayne, for the Court, said: "The filing of the petition was a caveat to all the world. It was in effect an attachment and an injunction. Thereafter all of the property rights of the debtor were *ipso facto* in abey-

ance until the final adjudication. If that were in his favor, they revived and were in full force. If it were against him, they were extinguished as to him and vested in the assignee (trustee) for the purposes of the trust with which he was charged. The bankrupt became, as it were, *civiliter mortuus. Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril.* They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps, they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee (trustee) is in all respects just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise, the efficacy of the act depended not upon its own language, but was only what others outside of the proceeding might permit it to be. This would be a solecism and largely defeat the purposes of the statute and the policy of Congress in enacting it."

It would seem that the provisions of Section 2 of the Act and the interpretation of the present and former acts as expounded in the cases above cited, together with a reasonable construction of the terms and purposes of the whole bankruptcy legislation as applied to the case at bar, would be sufficient to meet every objection which could properly be raised to the proceedings and judgment of the District Court, by Bernheimer, the self styled "Intervenor."

Bernheimer contended in his brief, and the Circuit Court of Appeals upholds him in his contention, that the petitioning creditors should have waited until a trustee had been elected and then have asked the court to direct the trustee to go into the State Court and bring a

formal suit against him for the property because of Section 23 of the Act, which is cited above. The court holds that the District Court had no jurisdiction whatever to try Bernheimer's title to the property. It goes on to say (Record, p. 34) "the adverse claimant is entitled to his day in court and in that court in which the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery, in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him."

The court goes on to say further (see Record, p. 33), "It is therefore apparent that, as a general rule, all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such (or other duly appointed and empowered representatives of the bankrupt's estate) and adverse claimants concerning the property acquired or claimed by the trustees (or other duly appointed and empowered representatives of the bankrupt's estate), which cannot be and are not adjusted by negotiation, arbitration or compromise, *must be abandoned by the trustees or adjudicated in the State Courts, unless by consent of the proposed defendant suit can be brought in a United States Court.*"

We respectfully contend that the proceedings against Bernheimer was not a suit against an adverse claimant, and especially that it was not an original suit. It was merely auxiliary to the main proceeding and was a graft upon it or rather it might be called an off shoot.

The property was taken from Bernheimer because his taking and holding of it was a fraud upon the act and an interference with the jurisdiction. The notice was issued to enable the court to determine whether its authority had been misapplied, as Bernheimer claimed,

and to determine the truth or justice of such claim. It was the purpose of the court to determine, speedily and inexpensively what Bernheimer might have to say.

Bernheimer then came in, styling himself "Intervenor" and filed what Mr. Justice Story calls in Clarke v. Mathewson, 12 Pet., 164-172, a dependent bill.

"When any person," says Mr. Daniell (Ch. Pr. Ch. 26, Sec. 7, p. 1057), "claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property requestered. This inquiry is called an examination *pro interesse suo;* and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate."

It has been said that the grounds of this proceedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court.

It seems to us that this is just what Bernheimer did in the case at bar.

After a careful examination of Section 23 *b* of the Act, it seems clear to us that the suits referred to in that section and which the trustee must bring in the State Courts are such as are based on causes of action vested in the bankrupt prior to bankruptcy proceedings and which were transmitted to the estate by the assignment. As to these, it may be conceded that the trustee must, under the Act, resort to the court which would have had jurisdiction of the action if brought by the bankrupt.

The action, however, to recover assets unlawfully concealed or assigned, is not derived from the bankrupt, but is vested in the creditors through their trustee, by statute, and jurisdiction to enforce it is necessarily invested in the Court which is charged with the administration of the estate. Where rights of action existed in favor of the bankrupt, the trustee becomes a new party, but in the same forum and there would be no especial reason for bringing such actions in the District Court. Congress has followed out the opinions of this honorable court which have suggested that it might bring about hardship if outside parties against whom the bankrupt held a right of action, are to be brought into the District Court to defend such suits when they may reside at some distance from the place of holding these courts and may be entirely innocent of any wrong-doing.

The causes of action, however, which arise through the administration of a bankrupt's estate in a Federal Court, are simply off shoots from the main proceedings and it cannot be that Congress meant to take all jurisdiction to try such causes from the District Courts by Section 23 *b*, and to confer the jurisdiction upon State Courts.

Congress has not the power, if it had the will, to confer jurisdiction on any State Court.

Dudley v. Mayhew, 3 N. Y. 9.
Valarino v. Thompson, 7 N. Y. 576.
Martin v. Hunter, 1 Wheat. 334.

Under the Act, as we interpret it, Congress has not attempted in any way to force the administration of the Act upon the State Courts. It has simply said that the Federal courts shall not, although they may have jurisdiction of the subject matter, proceed to adjudicate causes of action which existed in favor of the bankrupt before proceedings in bankruptcy were instituted, except by consent of the proposed defendant. Had this

been such a cause of action, the State Court would under the act have exclusive jurisdiction.

This cause of action is one which was created entirely by Congress and, although the State Courts might have concurrent jurisdiction with the Federal Court and might take cognizance of causes of action born through Federal legislation, yet Congress cannot compel them to do so, as they are not in any sense inferior Courts under the constitution and are not ordained by Congress.

Stearns v. U. S., 2 Paine 211.

If State Courts are left to adjudicate causes of action which existed prior to bankruptcy proceedings, then the same rules of evidence will obtain, although the trustee may have become a party under the act and no one can complain.

If, however, the State Courts are to have exclusive jurisdiction, not only of causes of action which existed prior to bankruptcy proceedings, but also of causes arising purely through the administration of the Act, then can it be said that the bankruptcy system will be uniformly administered?

Congress cannot prescribe rules of evidence for the State Court.

People v. Gates, 43 N. Y. 40.
Caldwell v. Steamboat Co., 47 N. Y. 282.
Carpenter v. Snelling, 97 Mass. 452.

Would it be reasonable to suppose that Congress would have delegated such broad authority to the District Courts in such plain language in Section 2 of the Act, if it had intended by Section 23 *b* to leave to them but little besides the adjudication, distribution and discharge?

Congress has the right to pass uniform bankruptcy laws, but the State Courts are not obliged to assist in administering them.

"States in providing their own judicial tribunals, have a right to limit, control and restrict their judicial functions and jurisdiction according to their mere pleasure."

Per. Clifford, J., in Shearman v. Bingham, 7 Bk. Reg. 500.

It is to be supposed that Bernheimer would have preferred that the District Court should have waited until a trustee had been elected and then have the trustee bring a formal suit against him in the State Court, which might not come to trial for months afterwards, when he could mock the efforts of the trustee to prove the articles composing and the value of a stock of goods which had been scattered to the four winds, and which the trustee had never seen. Why not execute a bond and attach in the State Court so that there would be no delay? Who would execute such a bond and who would become surety for a trust estate, when that estate was being juggled about, scattered and hidden away? Surely Section 23 *b* cannot mean that the consent of a wrongdoer such as Bernheimer must be obtained before the District Court can by its own orders protect its jurisdiction. The very act itself, section 29, sub. *b.*, No. 4, makes it a crime for any person to receive "any material amount of property from a bankrupt after the filing of the petition, with the intent to defeat this act." Davidson, the assignee, was simply Abraham's agent. He had no more title to the property than Abraham had. The assignment was void.

The above is our interpretation of Section 23 *b*, and if the Act is enforced according to this interpretation, no one can be heard to complain reasonably. No one is

brought into the District Court either through petition and order or plenary bill unless he has in some way busied himself with the bankrupt's affairs or attempted to loot the estate. As to other parties against whom the bankrupt had rights of action before the proceedings, these rights would be adjudicated in the same forum in which suit would have been brought had proceedings in bankruptcy not been instituted. The court would have jurisdiction over the cause of action, but not over the person, except by consent. The interpretation would seem to be reasonable, just and fair.

There have been a great many interpretations of Section 23 and the various District Courts and some of the Circuit Courts differ widely as to its meaning when taken in connection with other parts of the bankrupt law. There is no other part of the Act of 1898 for which there is a more crying need of interpretation by this Honorable Court. While it is our opinion that the question of jurisdiction has been injected into this case improperly, yet the fact that it is now in it will make the necessity for deciding the question just as urgent.

The great preponderance of decisions is in favor of the interpretation which allows the District Court to proceed with the collection of the assets of a bankrupt estate as provided for in the act, except where the right of action existed in favor of the bankrupt before proceedings in bankruptcy were instituted. In some jurisdictions, all actions must be brought in the State Courts unless the bankrupt or his friends voluntarily deliver the property to the trustee. The words of Mr. Justice Miller in Sharpe v. Doyle, above cited, come home to us with particular force when we see the effect of the latter interpretation upon the case at bar. The District Courts should have full power to administer the estate without donating their rights of action to the State Courts, where

they would at best be but poorly and slowly adjudicated. They should by all means be allowed to exercise the authority given them under the Act to protect their jurisdictions and the estates which come into their care from those who seek to speculate upon them.

They should not be made the spawning beds for innumerable suits which will arise through inability to protect their jurisdiction and which must afterwards be nurtured and tended through a long and precarious existence in the State Courts. The declared purpose of the Act is to administer estates cheaply, rapidly, honestly and uniformly and it cannot be done while the present conflict in decisions exists and while parties are allowed to loot an estate over which a District Court has obtained jurisdiction and then choose the forum and the proceedure which may best suit their purposes for a trial in the matter.

We cite below several cases on the question of jurisdiction and we would especially invite the attention of this Honorable Court to the able and exhaustive opinion of Judge Lowell in the case of *In re.* Hammond, and to that of Referee Olmstead in "In the matter of Andrew J. Murphey," in which the history of bankruptcy legislation is taken up and thoroughly discussed.

In re. Sievers, 91 Fed. Rep. 366.
In re. Brooks, 91 Fed Rep. 508.
In re. Gutwillig, 92 Fed. Rep. 337.
Davis v. Bohle, 92 Fed. Rep. 325.
Carter v. Hobbs, 92 Fed. Rep. 595.
In re. Richard, 94 Fed. Rep. 635.
Carriage Co. v. Stengel, 95 Fed. Rep. 637.
Murray v. Beal, 97 Fed. Rep. 569.
In re. Newberry, 97 Fed. Rep. 24.
In re. Woodbury, 98 Fed. Rep. 833.

In re. Andrew J. Murphy, National Bk. N. & R., Vol. 2, No. 8, 393.
Norcross v. Nathan, 99 Fed. 414.
Cox v. Wall, 99 Fed. 546.
In re. Hammond, 98 Fed. Rep. 845.

The Circuit Court of Appeals in this case says that the District Court had no jurisdiction whatever to try and determine Bernheimer's title to the property. We contend that under Section 2 of the Act, it had full power to do so and that original jurisdiction was given it. It then orders the District Court to fix and allow to Bernheimer "all costs, counsel fees, costs and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him (Bernheimer), they to be "paid by the petitioning creditors."

How can the District Court proceed to fix and allow such damages for the taking and detention of the property until it first determines whether Bernheimer had a good title to the property? If he had no right to the property, then he was not damaged by the taking and detention and the petitioning creditors would have a right to require Bernheimer to prove in the District Court first of all things, that the property belongs to him. He must lay his predicate for the proof. The Circuit Court of Appeals says that the District Court has no jurisdiction to do this and yet it proceeds to direct it to do so.

The right of the petitioning creditors to require this proof has been fully decided by this court in the cases of Sharpe v. Doyle and Feibelman v. Packard, above cited. Besides this, there is not in the Bankruptcy Act anywhere any authority for the allowance of damages such as are attempted to be awarded in this case.

This Honorable Court has said that a court which has no jurisdiction of a case, cannot even award costs or order execution for them to issue.

Judge Parlange, in his opinion dissenting from that portion of the decision of the Circuit Court of Appeals which awards, these costs, damages, counsel fees, expenses, etc., cited the following cases:

Mayor v. Cooper, 6 Wall. 247.
Smith v. Whitney, 116 U. S. 175.
Elk v. Wilkin, 112 U. S. 98.

We earnestly and respectfully contend that the action of the District Court, sitting in bankruptcy, was in all things proper, and respectfully pray that the judgment of the Circuit Court of Appeals in this case, and every part thereof, may be reversed by this Honorable Court.

Respectfully submitted,

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JOHN D. ROUSE,
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No. 297. 58

Brief of Clark for Respondent.

Office Supreme Court U. S.
FILED
OCT 10 1899
JAMES H. MCKENNEY,
Clerk.

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Filed Oct. 10, 1899.

In the Supreme Court of the United States

Application for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

LOUIS BERNHEIMER, INTERVENOR, APPELLANT,

vs.

L. J. BRYAN, MARSHAL, FOR USE OF, ETC., APPELLEE.

Brief of Thos. H. Clark

For Louis Bernheimer, Against Application.

In the Supreme Court of the United States

Application for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

LOUIS BERNHEIMER, INTERVENOR, APPELLANT,

vs.

L. J. BRYAN, MARSHAL, FOR USE OF, ETC., APPELLEE.

Brief of ~~E. W. CHILTON~~ Thos. H. Clark,

For Louis Bernheimer.

The facts of this case are as follows: On the 29th day of October, 1898, one D. Abraham, made a general assignment for the benefit of all his creditors to H. C. Davidson, and this assignment was, on the day of its execution, filed for record in the office of the Probate Judge of Montgomery County. On the 7th day of November, 1898, certain creditors of Abraham filed their petition in the District Court of the United States for the Middle District of Alabama; setting up the making of said assignment by Abraham, and praying that he be declared a bankrupt. On the 12th day of December,

1898, Abraham was adjudged an involuntary bankrupt, on this petition. (Pages 1, 2, 3 and 4 of printed transcript.) But nearly thirty days before the adjudication in bankruptcy, Davidson, the assignee, under the duty imposed and the authority vested in him by the deed of assignment, on the 17th day of November, 1898, proceeded to advertise the sale of the property assigned by the assignment, viz: the stock of goods and store fixtures which are the subject-matter of this litigation, that after Davidson had given notice and was about to proceed to sell the property assigned, the petitioning creditors filed another petition in said court, asking that Davidson be ordered to appear before the court and show cause why he should not be restrained from selling the assigned property; that in obedience to the rule *nisi* issued on the last petition, Davidson did appear before the court "and showing cause satisfactory to the court, said rule was discharged and said court declined to make the order prayed for restraining him from selling said goods." (See Bernheimer's Intervention, p. 15 of Printed Record.) Immediately after the discharge of the rule *nisi* and the order of the court refusing to restrain Davidson as assignee from making the sale, said Davidson, as assignee, proceeded to sell said goods at public auction, for cash, in the city of Montgomery; that at this sale appellant, Bernheimer, bought said goods for the sum of three thousand, five hundred dollars cash, paying the money and going at once into the possession of the goods, and remaining in possession until dispossessed thereof by the Marshal, the appellee. (Bernheimer's Intervention, p. 15 of Printed Record.)

On the 12th day of December, 1898, the petitioning creditors of Abraham filed another petition, asking the court to order the marshal to take possession, among other things, of all the stock of goods sold by Davidson

to Bernheimer. This petition avers that "said Davidson, disregarding the authority and jurisdiction of the court, proceeded to sell and dispose of said property." It will be noted that of course this petition was filed AFTER the court had refused, at the instance of these very creditors, to restrain Davidson, and that with full knowledge of all the facts they had permitted Davidson to sell. (See p. 5 of Printed Transcript.) Allegations were made in this petition that the goods were sold at a sum greatly less than their value, and nowhere under the issues joined in Bernheimer's intervention is any such fact disclosed, if it did exist. Bernheimer's sworn intervention shows that the price paid by him "was a fair, just and reasonable price" for said goods. On this averment the appellee has refused to take issue, and the court below, in sustaining his demurrers, refused to compel him to take issue. (Bernheimer's Intervention, p. 15, of Printed Transcript.)

It will be noted that all of the proceedings brought to abrogate appellant's title to the goods in question, were, up to and including the filing of the last named petition, wholly *ex parte*, and no proofs seem to have been made or required of the averments of the petition. But, on the last petition, the court did, on the 13th day of December, 1898, issue, apparently *ex mero motu*, an order, commanding Bernheimer to appear within ten days from said date, and "propound any claim he has to the goods so seized, or any part thereof, or, failing therein, he will be deemed to have no claim or right thereto." Supplementary to the effort to deprive Bernheimer of the goods, the petition of the creditors of date of filing, December 17, 1898, was made, asking that Bernheimer be made to account before the Referee in Bankruptcy for the proceeds of the sales which had been made by him of any of the goods so bought from Davidson. No

order by the court on this latter petition appears to have been made, so far as this transcript is concerned, but, as is apparent from the answer of Bernheimer filed "as a part of the proceedings on his propounded claim," such order did issue. Some apparent interruption in the continuity of the Record is caused by the fact that the said rule to Bernheimer, ordering him to show cause, was issued before the filing of the petition asking that he be compelled to account, etc., but both the propounding of his claim and his answer to the order to account were parts of the same proceeding. They were treated as such, for, it will be observed the demurrers of appellee were filed to both claims, or, rather, they were filed to the claim filed December 22d, and re-filed to answer filed December 24th, and the judgment entry on page 17 of Record includes them both by name. The demurrers to Bernheimer's claim propounded under the order of the Bankrupt Court are found on pages 13 and 14 of the printed transcript. It should be added to the statement of the facts in this case, that the Record discloses, by the sworn petition of the creditors for whose use appellee, as marshal, is holding these goods, that Davidson, as assignee, and before the sale by him to Bernheimer, complied with the laws of the State of Alabama in reference to assignments. (See petition of creditors, page 4, of printed transcript.) In the words of this petition "That upon the delivery of the deed of assignment to him the said H. C. Davidson entered upon the execution of said trust; that afterwards, as required by the laws of the State of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee, in the office of the Register in Chancery of Montgomery."

These demurrers, and the whole Record, raise only three questions:

1st. Did the District Court have jurisdiction to try the title to these goods by seizing the property without notice to Bernheimer, and then compelling him to come in, by a rule, to propound his claim or show cause?

2d. Did Bernheimer, under the peculiar circumstances of this case, acquire a title to the goods sold to him by Davidson paramount to the claims of D. Abraham's creditors?

3d. Does the fact that these goods were so sold to Bernheimer under the direct or implied sanction of the District Court, in refusing to restrain Davidson from selling, in a proceeding brought by the creditors for whose use the appellee is acting, and of which they had full notice, which sale they did not endeavor to prevent in the only manner by which, under the Bankrupt law, they might have prevented the same, estop them, and the court so acting, and its officer, the appellee, from assailing the validity of such sale as they have assailed it?

This case presents some remarkable features. We have this peculiarly anomalous state of affairs. The proceeds of the sale made by Davidson, as assignee, are being administered in a State Court—the City Court of Montgomery, sitting in Equity, for the benefit of all the creditors of Abraham, including the petitioning creditors in Bankruptcy, and the goods so sold, have been seized and taken into the custody of the United States Court, in the Bankruptcy proceeding against Abraham. Who are the *cestuis que trust* in the City Court? The creditors of Abraham, of course. Who are the beneficiaries of the estate in the United States Court? Of course these same creditors. The proceeds of the sale to appellant certainly can not, in any event, belong to the Bankrupt. His creditors are entitled to all his property for the liquidation of his debts. The money can

not belong to Davidson, for he only holds as trustee for the benefit of the creditors. It would be a flagrant absurdity to say that Bernheimer owns the money still; and Davidson could not pay it back to him, without being guilty of a breach of trust, and Abraham's creditors could hold both liable for the full amount, should this be done. Here the court's attention is called to the statement made by Bernheimer in his claim filed on the — day of December, 1898, in response to the urgent invitation of the District Court, which has been re-enforced by the sequestration of the property he had bought—a sequestration that preceded the invitation, by the way. Bernheimer, in this claim "asks the court's protection in the premises." (~~He was in grievous need of it.~~)

He asks that the court will issue such rules and orders in the premises as may be necessary for his protection. He further asks that the creditors of the Bankrupt estate be remitted to the fund derived by Davidson from the purchase of the goods." He asks that "in default of such order, or if he is mistaken in the relief prayed for" that the court issue a rule commanding Davidson to pay into the court the full amount derived by him from the appellant, as purchase money of the goods; that the same be paid over to him, and, should this be done, he offers to rescind the purchase and waive all claims to the goods. But no. In spite of all these facts being made apparent to the court, it is inexorably adjudged that he has no claim to the goods and no relief whatever. Not only must the goods, but the money he has paid for them, be devoted to the satisfaction of the debts due by Abraham. Can it be doubted that Davidson, holding moneys belonging to the Bankrupt estate, was under the control of the District Court? These very creditors asked for an order against him to turn over to

the Marshal of the court "the books, accounts, papers, choses in action and any other property or effects, which may be in his possession." See petition of creditors, p. 5 of printed transcript. The District Court, on this petition, ordered Davidson to do so. It is a necessary consequence of this condition of affairs that the proceeds of this purchase by Bernheimer was, in legal effect, in the custody of the District Court,—it was most assuredly under its control, at the very time that Bernheimer implored in vain its protection. Indeed, nothing in this record discloses that the Marshal has not already got this money. It is the presumption of law that he has obeyed the mandates of the court In substance and law these creditors and the court which was guarding their interests with such earnest care that, it seems to us, the just rights of appellant were wholly ignored, were and are in the position of one who seeks to abrogate a sale or rescind a contract without any proposition or effort to put the other party in *statu quo*. If these creditors were of those who were beneficiaries under the assignment to Davidson, and that they are so can not be denied. If the District Court had that control, over Davidson and all assets in his hands, belonging to the Bankrupt estate, including the proceeds of the sale to appellant, which it undoubtedly had, and indeed exercised at the instance of these very creditors, as indicated in the order and petition last mentioned; then the creditors, and the court and its officers for them, had actual control and custody, in legal effect, both of the goods Bernheimer had bought and the money he had paid for them. Is there anything in this record which exempts them from the just rule that one can not "eat his cake and keep it too?" It is the universal rule of law and equity that a vendor, or a vendee seeking to rescind and annul a contract of sale, or

any other agreement, must "put the opposite party in *statu quo* before he can exercise the right."

Walker v. L. & N. R. R. Co., 111 Ala. 233.

This is so, even where the party against whom the recission is sought has been guilty of fraud. It may be urged that Davidson was not a party to this proceeding, and that the fund he had was not *in custodia legis*. For that matter, neither was Bernheimer a party and neither were the goods he had, in *custodia legis*, until the property he had bought was taken from him, in an *ex parte* proceeding, and without any due process of law, and he was commanded, after being stripped of his goods, to come in and say if he had any right in them. But there is no doubt that Davidson was under the power of the court. Admittedly, he had assets which by the express terms of his title thereto, viz: the deed of assignment, belonged to the creditors of Abraham's bankrupt estate His did not, and does not, in deed or word, pretend that he holds now adversely to these creditors. Why did not these creditors, represented by appellee join in the reasonable request of Bernheimer, that the court would order this assignee who held this property—this money paid by Bernheimer *for them*, to pay it into court, so that the court might order it repaid to Bernheimer, and, by thus putting him *in statu quo* give some appearance of justice to the recission of Davidson's sale to him? The answer must be found in something *dehors* this record. As it stands the only reasonable solution they can give for their conduct is to say with open, though somewhat brutal frankness that they purpose getting Bernheimer's goods and the money he paid for them also. This will unquestionably be the result if the District Court judgment is allowed to stand.

Appellant insists that the District Court was without ju-

risdiction to try and determine his title to these goods, by a sequestration and and rule on him to show cause. At the time they were seized, without due process of law, and at the time he was compelled, without due process of law to come in and claim them under this rule to show cause, he was claiming them adversely and against the world. He claimed them by a purchase from another person, Davidson, a man whose title in its inception was unquestionably legal.—Section 4167 *et seq.* of the Code of Alabama, 1896. Before Bernheimer's holding and title or Davidson's holding and title could be swept away, they had the right to demand due process of law to ascertain in a suit against them; not by *ex parte* proceedings in a suit to which they were not parties, not by a mere rule to show cause, but by the ordinary process of the law, that they had no title. It is a delightfully easy thing to say—you have no title to these things; the law says your supposed title is a nullity and this rigmarole about suing you and having a judicial determination of the law and facts is wholly useless and merely the suggestion of an annoying delay. For why? Because the good old rule sufficed *them*—the simple plan that "he may take who has the power, and he may keep who can."

But the United States has a Constitution, to which something more than perfunctory respect is paid. In that Constitution is a clause which provides that no one shall be deprived of his property without due process of law. What is "due process of law," has been the subject of much talk and more writing. We conceive it to mean the ordinary methods and proceedings provided by law for the ascertainment and adjudication of conflicting claims of litigants in courts of justice. But abstractions are unnecessary in this case. The Supreme Court of the United States has said what is and what is not "due process of law" under circumstances and in cases on "all fours" with

the case at bar. We will cite and comment on a few of them.

Smith v. Mason, 14 Wall. 419;
Marshall v. Knox, 16 Wall. 551;
Massie v. Allen, 17 Wall. 351.

It must also be borne in mind that there was no allegation in the petition that Bernheimer was insolvent or could not respond to any damages for any conversion by him. It follows,then, that unless this allegation could be made, the contrary is true, construing the proposition most strongly against the pleader. If it be argued that the bankruptcy court would be powerless to prevent dispossessions of this character without resorting to some of the rules, we reply that there certainly is no inherent power, in view of the constitutional and other inhibitions of the District Court to exercise this character of rule to deprive a person of property, and more especially when the proceeding is strictly statutory under the Bankruptcy Act of 1898, and this act provides for just such a contingency as that in this case. It will be seen from the pleadings that when Davidson, the assignee under the State law, was cited to appear before the District Judge to show cause why he should not be prohibited from disposing of the goods, the District Judge annulled this order and let Davidson go hence; and in so doing, he was controlled by the Bankruptcy law, sub-division E. of Section 3 of Chapter 3, where it provides the only remedy for taking charge of the goods of a bankrupt without notice, which remedy consists of the filing of a bond by the petitioning creditors with the court, or the Judge thereof, in such sum as the court may direct, conditioned for the payment, in case such petition is dismissed, of all costs, expenses and damages occasioned by such seizure, taking, detention, etc. In view of this statute, the vacating of the previous order was proper, and if it was

proper then, it was certainly error to issue another order, without any notice, the making of a bond or anything required by the statute.

Sub-division E. of Section 67, Chapter 7 of the Bankruptcy Act, provides that after the adjudication in bankruptcy and the property passing to the trustee, it shall be his duty to recover the same by legal proceedings or otherwise, for the benefit of the creditors. These remedies must be strictly followed, and they are exclusive. It would have been easy and very simple for the bond to have been given and the notice issued before the adjudication. Under the adjudication, for the trustee by legal means, or equitable means —if necessary, by due processes of law to have taken charge of this property, this would have given the appellant a day in court, and it certainly never was the intention of Congress to leave with courts of bankruptcy any summary methods, when two plain and adequate methods are described in the Act itself. It follows from what we have said above that the court acquired no jurisdiction to try this case. See—

Smith v. Mason, 14 Wall. 419.
Marshal v. Knox, 16 Wall. 551.
Massey v. Allen, 17 Wall. 351.

In Smith v. Mason, Mr. Justice Clifford, in delivering the opinion of the court, says, among other things: "Strangers to the proceedings in bankruptcy not served with process, and who have not voluntarily appeared and become parties to such a litigation, can not be compelled to come into court under a petition for a rule to show cause, as in this case, nor is the exercise of such a jurisdiction necessary, as the third clause of the second section of the Bankrupt Act affords the assignee a convenient, constitu-

tional and sufficient remedy to contest every adverse claim made by any person to any property or rights of property transferable to or vested in such assignee.'' It may be contended that the present act gives the courts a little fuller jurisdiction, but, as cited above, it specifies the mode and manner for the assignee to recover property and for the petitioning creditors to stop the sale of property, and in the case at bar the mode and manner so specified was in no sense attempted or resorted to.

In Marshal v. Knox, cited *supra*, Mr. Justice Bradley, in delivering the opinion of the court, says, among other things: ''The case here then depends on the question whether the district court had jurisdiction to proceed by rule, as it did. The goods, it has been seen were in the custody of the sheriff under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right to thus hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the sheriff had present possession for the benefit of the lessor. Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such. They were not before the court and the court had no control or jurisdiction over them. Under these circumstances, the assignee applied for and obtained from the district court a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law? We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual process of law in defense of

their rights." Mr. Justice Bradley cites the case of Smith v. Mason, (*supra*), and re-affirms it, saying: "It is the opinion of the court, therefore, that the case is not substantially different from that of Smith v. Mason, besides, it has another point in common with that case upon which a direct adjudication was made therein. The lessor in this case was not a party to the bankrupt proceeding, and in Smith v. Mason we held expressly that 'strangers to the proceedings in bankruptcy, not served with process and who have not voluntarily appeared and become parties to such litigation cannot be compelled to come into court under a petition for a rule to show cause.' The court is of the opinion, therefore, that the district court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up the possession of the goods in question to the assignees."

In the case of Massey v. Allen, cited *supra*, the assignee in bankruptcy did not resort, nor did the court, by summary methods, attempt to take possession of the goods, and Mr. Justice Field, in delivering the opinion of the court, in that case, merely re-affirmed the doctrine that the assignee in bankruptcy may recover the property ineffectually attempted to be transferred, setting forth just the remedy that appellant thinks should have been adopted in the case at bar. If Congress should have attempted to invest courts of bankruptcy with the power to take property by rule, or any other summary method, this is taking property or determining right without due process of law. Davidson's possession was legal and rightful. His sale was legal, usual and necessary. Bernheimer's possession was lawful, rightful and adverse. See Code of Alabama, 1896, § 4167, *et seq.*), and this possession could not be changed without due process of law.

I refer the court to the able opinion of Judge McCormick rendered in this cause reported in Vol. 93, Federal Reporter, p. 767.

See also 92 Fed. Rep. 594.
92 Fed. Rep. 325.

As to that portion of the judgment allowing Bernheimer counsel fees, etc. See Bankrupt Act, Sub-division "E." Section 3.

Thos. H. Clarke

Solicitor for L. Bernheimer.

No. 297. 58

Brief of Steiner for Respondent

Filed April 19, 1900.

Office Supreme Court U.
FILED
APR 19 1900
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

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LOUIS BERNHEIMER.

Brief of R. E. Steiner and Gordon Macdonald, for Louis Bernheimer.

The facts of this case are accurately and succinctly stated in the statement preceding the opinion of the Circuit Court of Appeals. This statement is found on pages 19 to 26, inclusive, of the printed record.

In the first place, and to fix in the Court's mind a true idea of the great haste and summary character of the proceedings instituted in the District Court for the Middle District of Alabama, sitting in Bankruptcy, against Bernheimer, it will be seen that the adjudication

of Abraham as a Bankrupt was made and filed on Dec. 12, 1898, at 4:50 p. m. (See page 3 of Record.) Three minutes afterwards the petitioning creditors filed a petition asking the Bankrupt Court to make an order requiring L. J. Bryan, the marshal of the court, to take possession of the property purchased by Bernheimer of H. C. Davidson, the assignee of Abraham, the Bankrupt. Three minutes *before* this petition was filed the Judge of the District Court made an order on this petition, which was not then in Court, commanding the marshal, among other things, that "he demand, receive and take possession of all the property sold by said Davidson as assignee, to L. Bernheimer, or to any one else, and which may now be located in that certain storehouse on Dexter Avenue in the city of Montgomery, known as No. 106" (See page 6 of Record.) Great particularity seems to have been exacted as to the en-endorsements of the hour and minutes of the filing of these papers. Why this was done we do not know, but the endorsements disclose the fact that the Court made its first drastic order without having any petition, praying for such order, before it. Such was the initiation of these extraordinary proceedings. Just here, we ask the Court's attention to the prayer of the petition, found on pages 4 and 5 of the Record, and the language of the order made therein, on page 6 of the Record. The petition does not ask that the sale from Davidson to Bernheimer be set aside. There is a general averment,—nothing more—that the price paid by Bernheimer to Davidson was "greatly less than the appraisement made by said appraisers;" i. e., the appraisers appointed by the Register in Chancery of Montgomery county, Alabama, and, again, "at greatly less than its value." How much less, or for what price is not shown. Davidson, as assignee, being in posses-

sion of the money paid him by Bernheimer for *all* of the bankrupt effects—(for the petition avers that while it was Davidson's duty "to hold all the property and effects of Abraham, etc." he "proceeded to sell and dispose of said property and did dispose of the same", and his only sale was to Bernheimer)—the creditors asked in said petition that "Davidson be required to deliver to Bryan, as marshal, the books, accounts, papers, choses in action and any other property and effects in his possession" belonging to the bankrupt's estate, and also that Bryan, as marshal, take possession of all the property sold by Davidson, as assignee, to L. Bernheimer or to anyone else. The order of the Court, made before the petition was filed, closely followed the prayer of the petition and by it Bryan, the marshal, was ordered to "demand and receive from Davidson all books, accounts, papers and *other effects* of said Abraham which may be in the possession of said Davidson, as assignee," and the marshal was further ordered to take possession of all the property which Davidson, as assignee, had sold to Bernheimer

Assuming that the marshal did his duty and obeyed the order of the Bankrupt Court—and there is nothing in the record which shows he did not—he demanded and received from Davidson the $3,500.00 paid by Bernheimer to him for the goods. This was certainly a part of the bankrupt estate, and these very creditors, along with all others, were the beneficiaries under the general assignment made, as stated in the first petition filed, (see page 4 of Record)—"for the equal benefit of his creditors." So then, on the face of this proceeding, there was an attempt not only to seize the goods Bernheimer had bought and paid for, but also to bring into court the money he had paid for them! The record shows that Bryan, the marshal, seized the goods. The record

is silent as to whether he got the money or not from Davidson, and we are addressing ourselves to this record alone. At this point in the proceedings it seems to have occurred to the marshal, *ex mero motu*, so far as this record shows, that, as Bernheimer's goods had been sequestrated without any notice or other process of law directed to him, it might be at least decent and proper to *invite* him into court and see what *he* had to say to the summary manner in which he had been treated. The record does not show the marshal's petition in this behalf, but the Court's order of Dec. 13, 1898, (p. 7 of Record) recites that it was made on some petition of the marshal for "instructions," and it ordered that Bernheimer be notified to appear before the Court "in ten days from the date hereof and propound any claim he might have to the goods so seized, or to any part thereof, *or, failing therein, that he will be decreed to have no claim or right thereto!*" The italics and exclamation point are ours, of course. On the 17th day of December the petitioning creditors filed another petition, asking that Bernheimer be made to account, before the referee in bankruptcy, for the proceeds of the sales of any of the goods purchased by him from Davidson, before the seizure by the marshal. (Record, pp. 7 and 8). No order issued on this last petition, because Bernheimer came, upon the urgent invitation issued to him under the marshal's petition, and filed the two answers (Record, pp. 9, 12 and 13). In this connection the record discloses that some error was committed in the order in which the pleadings are stated. The two answers of Bernheimer to the rule should appear before the demurrer thereto, which appears on pages 11 and 12 of the record. But the dates of filing and refiling make this clear. The Court will always bear in mind that no rule had been issued to Bernheimer in the first instance

to show cause why he should not be ordered to *surrender* his goods. There was no sequestration to compel an answer, or issued in default of an answer. Unlike any proceeding known to an orderly administration of the law in any forum where the rights of the citizen are justly considered, the sequestration *preceded* the order to show cause or answer. Lugged into court in this summary way, Bernheimer filed his two answers to the twin petitions of the creditors, and showed cause, as best he could, in response to the court's demand. He had no choice in the matter. The Court had assumed jurisdiction to try his title, and to make that claim good, had seized his property. He was in no position to plead to the Court's jurisdiction. Little good could such a plea have served, for the Court had emphatically ordered him to come in and propound his claim, and, should he fail, had notified him that it would adjudge he had no title to the goods. Bernheimer's answer to the rule or mandate of the Court, found on pages 12 and 13 of the Record, in our opinion, and in the opinion of the Circuit Court of Appeals for the Fifth Circuit, demonstrates that the Bankrupt Court had no jurisdiction to seize the goods and try the title thereto by a rule such as this. Brought into court *in invitum*—his presence assured by a sequestration of his property preceding the invitation, our learned opponents argued in the Court below that Bernheimer invoked and acquiesced in the assumption of this jurisdiction by the District Court sitting in Bankruptcy!

The averment in Bernheimer's answer that a restraining order had, prior to the purchase by him of the goods in question, been asked for by the petitioning creditors to prevent Davidson from selling the goods, and that this restraining order had been refused by the District Court sitting in Bankruptcy, is an important

phase of this case, as we shall presently show. The judgment, or order, on Bernheimer's "claim" to the goods is found on page 14 of the Record. The Court solemnly adjudged, on the facts presented by the answers alone, and on the law as raised by the demurrer thereto, that Bernheimer had no title to the goods, and ordered him to account for and pay over to the marshal all the proceeds of the sale of such of the goods as he had disposed of before the seizure by the marshal. The demurrer is found on page 11 of the Record.

We have made the above statement of the facts of this case, with commentaries thereon, for the purpose of giving the Court a clearer idea of the proceedings than might be attained by the mere recapitulation thereof.

The points of law presented by the Record are as follows:

1. Did the District Court, sitting in Bankruptcy, have the jurisdiction to try the title to the goods in controversy by summarily seizing them and requiring Bernheimer, the purchaser from Davidson, assignee of Abraham, by a rule following the seizure, to appear before that Court in ten days and propound his claim, or, in default of such appearance, be decreed to have no title thereto?

2. Was the Circuit Court of Appeals justified in holding that this case is within the spirit of Section 3. e. or Section 69. a. of the Bankrupt Act, and that Bernheimer, on the restitution of the goods seized, should be allowed costs, expenses and counsel fees against the

creditors for wrongfully obtaining the seizure of the goods in controversy?

3. Was appeal the proper remedy by which Bernheimer could review the adverse decision of the Bankrupt Court?

We understand that counsel *contra.* do not press the latter point here. A sufficient reply thereto is found on pages 36, 37 and 38 of the Record, in the opinion of the Circuit Court of Appeals.

In regard to the first and main point in this case, and, also, as to the third, Judge Parlange, who dissented from the majority opinion in the Circuit Court of Appeals, fully concurred with the majority. His dissent was based alone on the allowance of counsel fees, costs and expenses to Bernheimer in the judgment reversing the District Court's order and rendering a decree for Bernheimer. By what authority of law did the petitioning creditors in this case apply for, and the District Court issue the special warrant for the seizure of the goods Bernheimer had purchased? The first section of the Bankrupt Act of 1898 contains a full statement of the powers and jurisdiction of the District Courts sitting as Courts of Bankruptcy. There is nothing in this section which would warrant the issuance of the extraordinary special warrant of seizure in this case. Even if we were to concede, which we do not by any means concede, that subdivision three (3) of that section furnished justification or excuse for the summary proceeding adopted, the petition filed and the case before the Court would not authorize such seizure. In the first place, the petitions and the sworn answers to the rule revealed that Bernheimer was an adverse claimant of the property seized. His possession was not the possession of

the bankrupt. Secondly, neither the petition, nor any other matter before the Court, showed it was "absolutely necessary for the preservation" of the bankrupt estate that such a writ should be issued. There is no averment of the insolvency of Bernheimer or that he could not respond to any judgment which might be obtained against him in a proper proceeding for the goods in his possession, or for their proceeds, should he have sold the same. In all cases, whether at law or in equity, the Courts require that before the property of a citizen, in his possession and to which he claims title, can be sequestrated, not only must good cause be shown in the application for sequestration, but bond must be made to indemnify him against loss, before he can be dispossessed. This, alone, is that "due process of law" which is enjoined by the Constitution of the United States before one can be deprived of the possession of his property.

Art. V., Constitution of the United States.

It cannot be questioned that the District Court of the United States, sitting as a Bankrupt Court, is a purely statutory tribunal. Courts created by statute can have no jurisdiction but such as the statute confers.

Sheldon v. Sill, 8 How, 441.

Furthermore, the present bankrupt act was passed in the knowledge of this Court's decisions on former statutes of the like character.

Smith v. Mason, 81 U. S. 419;
Lathrop v. Drake, 91 U. S. 516;
Eyster v. Gaff, Ib. 516;
Marshall v. Knox, 16 Wall. 351;
Massie v. Allen, 17 Wall. 351;
Claflin v. Houseman, 93 U. S. 130.

In addition to the principle announced in these decisions, the Bankrupt Act of 1898 is quite different from that of 1867 and the amendments thereto, in so far as the jurisdiction of the Bankrupt Courts are concerned, as applicable to controversies between the trustee in bankruptcy and adverse claimants to property alleged to belong to the bankrupt estate. By Sec. 23, subdivisions "a" and "b," of the Bankrupt Act of 1898, it is provided that the Federal Courts shall only have jurisdiction of suits for property claimed or acquired by trustees in bankruptcy in the same manner and to the same extent only, as though bankrupt proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants, and that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have prosecuted them if proceedings in bankruptcy had not been instituted, etc."

We adopt, in this connection, as a part of our brief, the following language of the opinion of the Circuit Court of Appeals in this case: "If we concede or assume that the making of a deed of general assignment within four months of the adjudication in bankruptcy, which by the express terms of the law is an act of bankruptcy, wholly invalidates the deed so that no title can pass thereby as against the grantor's creditors, no matter what may be its terms or the avowed and apparent intent of the parties as shown by the deed (a concession which we are not now prepared to make, and do not make except for the purpose of the argument), the property and assets thereby attempted to be conveyed are precisely such assets and estate as it is made the duty of the trustee to recover and reclaim 'by legal proceedings or otherwise.' Whatever the words 'or otherwise' may embrace, it can hardly be seriously contended that they

embrace such summary proceedings in bankruptcy as the issuance of a special warrant to the marshal to seize the goods, and the service of a rule upon the claimant to come before the Court of Bankruptcy and render an account and make restitution for the value of any portion of such goods so attempted to be transferred to him which have been sold or otherwise disposed of by him. Such a construction would render more than nugatory surplusage the language 'by legal proceedings.' If, therefore, we were restricted in our view to the terms of Section 67e, it would clearly appear therefrom that 'by legal proceedings' must be intended controversies at law and in equity, as distinguished from proceedings in bankruptcy. But our view is not limited to the terms of Section 67 e.

"Conceding that the deed of assignment is invalid, and that no title passed to the assignee, or from him to the adverse claimant as against the grantor's creditors, then such title as the bankrupt had at the time of making the assignment vested fully in the trustee, and might, and doubtless often would be surrendered to him on demand. If such demand was refused, the act itself, as we have seen, provides for arbitration or compromise of the controversy. If these fail, and resort must be had to legal proceedings, the adverse claimant is entitled to his day in court, and in that court in which the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery, in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him. He would have a right to sue and to show, if he could, that title did not pass by the making and delivery of the deed. That is precisely what the trustee has to show, or, to state it more guard-

edly, the converse of that is precisely what the adverse claimant has the right to try to show, namely, that title did pass to him under the deed and by the subsequent action of the assignee.

"As already intimated, no question as to the validity or invalidity of the title of Bernheimer to the goods which he claims to have acquired from the assignee under the deed of assignment is now before us, but what we say in deciding the question of law is what we stated at the opening of this opinion to be the question: Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods, and order a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the district courts, as courts of bankruptcy, were not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction."

The cases of Smith v. Mason, and Marshall v. Knox and Massie v. Allen, *supra*, amply sustain the proposition that the bankrupt court had no jurisdiction to seize the property purchased by Bernheimer and to undertake to try his title thereto in the summary manner adopted in this case.

Even if it had such jurisdiction, was the case before that court one which showed that Bernheimer had no title to the goods purchased? It can not be questioned that at its inception Davidson's title under the general assignment was a valid one. It occurs to us as a monstrosity in law to hold that a title valid in its inception can ever be more than voidable by act *ex post facto* its creation. Under the statutes of Alabama, Davidson's possession was legal and rightful. His sale

was legal, usual and necessary. Bernheimer's possession was lawful, rightful and adverse to the world. The statutes of Alabama, in regard to assignments for the benefit of creditors, are found in the Code of Alabama, of 1886, from section 4152 to 4173 inclusive, which comprise Article I of Chapter 113 of said Code. We will not quote them in full, for it will not be contended that these sections do not recognize and validate such assignments as that made by Abraham to Davidson, and that they authorized, if not required, Davidson to proceed to administer the estate entrusted to him, for the equal benefit of all the creditors of Abraham in the State Court, in which he did attempt to administer it. If Davidson and Bernheimer's title was voidable merely, it must have been voided in some legal proceeding—by some due process of law. Attention is called to the fact that the petition for the special warrant of seizure in this case does not seek to avoid that title. It does not even make Bernheimer or Davidson a party to the proceedings, but merely asks for a writ of seizure. In no way or place do the petitioners recognize Bernheimer's rights to assert title to his goods, in any forum. It remained for the marshal, on his own motion and after the goods were seized, to suggest, as an officer of the court, not as any representative of the petitioning creditors, that Bernheimer be brought in. Can it be seriously contended, in view of Article V of the Constitution of the United States, and in view of the decisions above cited, which show that this court has "steadily set its face" against proceedings such as were initiated against Bernheimer, that such proceedings should receive the sanction of a free court in a free country? The process smacks of the ancient system of law once prevailing on the Scotch Border and known as "Jedwood Justice." To save

time, it was allowable, if not enjoined, under that system, to hang a man first and try him afterwards. Here the idea was to seize a man's goods and try his right to the possession afterwards. But, even worse than the Jedwood practice, these petitioners did not even suggest or ask that Bernheimer's title should be tried at all!

We are aware that there was, under the bankrupt act of 1867 and the amendments thereto, much difference of opinion as to whether a general assignment was void or obnoxious to the provisions of that law. Some cases went so far as to hold that an assignment for the equal benefit of all the assignor's creditors constituted a "preference." This seems to have been the decision in Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311. We do not understand the reasoning of that case. The conclusion seems an absurdity on its face. It is true that under the bankrupt act of 1867, only an assignment or other conveyance, made with the intent to hinder, delay and defraud creditors, was an act of bankruptcy, while under the act of 1898 the mere making of a general assignment for the benefit of creditors is an act of bankruptcy. But, fairly considered in the light of the authorities, there is but little difference, materially, in the results.

The case of Boese as Receiver v. King et als. assignees, etc., 108 U. S., sheds some light on the question.

The Alabama statutes referred to in a former part of this brief, which provide for the filing of an appraisement of property assigned to a person for the benefit of creditors with the Register in Chancery of the County in which the property is located, were not suspended by the bankrupt act, because they are in no ways in conflict therewith. We append to this brief the sections

of the Alabama Code bearing on such assignments. These statutes are in no true sense insolvent laws. No provision is made therein for the discharge of the debtor, nor do they, in any way, affect any contract of indebtedness. Even the insolvent laws of a state are not suspended by a National Bankrupt Act, except in so far as they may conflict with the acts of Congress.

Appeal of Geery, 43 Conn. 289;
Pugh v. Brassell, 22 Blatch. 440.

The operation of Federal bankrupt laws on identically such statutes as those contained in the Alabama Code, was considered in the case of Peck v. Parker, 65 Penn. St. 262. It was held in that case that "a voluntary assignment by a debtor in failing circumstances to a trustee, for the equal benefit of all of his creditors, does not depend, for its validity, on any statute, and the acts of a State Legislature, passed to regulate such assignments, which require the assignment to be recorded, compel the assignee to file an inventory and appraisement, and to give security, and provide for the settlement of the assignee's accounts and the distribution of the assets are not insolvent laws, and,hence, are unaffected by the enactment by Congress of a uniform law on the subject of bankruptcy."

But it has been expressly decided by this court that a general assignment for the benefit of creditors is not void as against the bankrupt laws, but, at most, voidable only. It is true that the decision alluded to was rendered under the bankrupt law of 1867, but, as shown from the authorities cited above, and many more might be cited to the same effect—there is no material difference between the statute now in force, so far as the construction in this respect is concerned and the construc-

tion pl[illegible]d on the old act. We allude to the case of Mayer & Evans vs. Hellman, 91 U. S. 495. Justice Field, rendering the opinion of the Court, says:

"The counsel for plaintiff in error has filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the bankrupt act, though made within six months previous to the filing of the petition. Their argument is, that such an assignment is only a voluntary execution of what the bankrupt court would compel, and as it is not a proceeding in itself fraudulent as against creditors and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in Sedgwick v. Place, 1 Nat. Bank Reg. 204, and of Mr. Justice Swayne in the Circuit Court of Ohio, in Longley v. Perry, 2 Nat. Bank Reg. 180. *Certain it is* that such an assignment is not absolutely void, and, if voidable, it must be because it may be deemed, perhaps, necessary to the efficiency of the bankrupt act, that the administration of an insolvent's estate must be entrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent."

This case also holds that the Ohio statute discussed which is in its terms similar to the sections of the Alabama Code cited, was not an "insolvent law" and was not in conflict with the bankrupt act.

It is true that the making of a general assignment for the benefit of creditors within four months before the filing of a petition for involuntary bankruptcy, is made an act of bankruptcy by the act of 1898, Sec. 3.a. But

the act expressly specifies what conveyances, transfers and assignments are *void* under this act. They are enumerated under Section 67.e. of the act, and the sentence of *nullity* is passed *alone* on these particular acts. These acts are as follows: "All conveyances, transfers, assignments or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition *with the intent and purpose on his part to hinder, delay or defraud his creditors. or any of them*, shall be null and void as against the creditors of such debtor." We cannot believe that a Court will impute a covinous intent to a man who makes a conveyance of all his property for the equal benefit of all his creditors.

Mays v. Hellman, 91 U. S., *supra*;
Reed v. McIntyre, 98 U. S. 510.

The case last cited is pertinent, in that it takes for granted that the question of title between the assignee or trustee in bankruptcy must be litigated in the usual proceedings at law or in equity between claimants to property. The opinion of the Circuit Court of Appeals on this point is found on pages 34 and 35 of the record, and has been already quoted in this brief.

It will be noted that even as to property conveyed by an assignment it is void, only because its purpose is to hinder, delay or defraud creditors. Section 67.e. of the bankrupt act provides that such property must be recovered by legal "proceedings." These words have a clear legal significance, the words added—"or otherwise," were well applied to the arbitration or compromioe mentioned in sections 26.a. and 27.a. of the act. Surely *any* construction is preferable to one which seeks

to vest a despotic and irresponsible power in a litigant to use the processes of a Federal Court to seize, without trial, the property held by an adverse claimant. See further;

Re. Romanow, 91 Fed. rep. 510;
Re. Seevers, 91 Fed. Rep. 366.

Even the extreme cases of Re. Smith, 92 Fed. Rep. 135, and Re. Gutwilling, 90 Fed. Rep. 475, do not go to the extreme of holding that a seizure of goods, even in the hands of an assignee for the benefit of creditors, much less of a person who has purchased in good faith from him, can be had without first an opportunity to him in court of showing cause why he should not be commanded to deliver the assigneed goods to the trustee. The court will observe that the writ of seizure and the seizure under it was had in this court *before* any trustee in bankruptcy was appointed. No receiver was appointed and none asked for. Section 67.e. vests the right to "recover and reclaim" property conveyed by the bankrupt in fraud of the law by "legal proceedings or otherwise" in the trustee. Conceeding that these legal proceedings or otherwise may include the right to ask for and obtain such an extraordinary writ as that under which the goods in controversey were seized in this case, the application therefor by the trustee was a prerequisite jurisdictional fact. But it will be contended that this summary order was issued under the provisions of subdivision 3 of Section 2 of the act. It is true that this part of the act gives the court power upon the application of parties in interest "*in case the courts shall find it absolutely necessary for the preservation of the estates*, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is appointed." In the first place, it is not alleged in the creditors' petition for the extraordinary writ, *nor was it*

found by the court that it was *absolutely necessary* for the preservation of this estate that this property should be seized as it was seized. The bankrupt court is a purely statutory court, the finding of this jurisdictional fact of "*absolute necessity*" (it would be hard to select stronger words), is made essential to the exercise of jurisdiction and no intendments will be indulged in favor of jurisdiction of purely statutory courts.

"In summary proceedings, where a court exercises extraordinary power under a special statute which prescribes its course, that course must be strictly pursued, *and the facts which give jurisdiction ought to appear on the face of the record, otherwise the proceedings are acsolutely void.*"

Thatcher v Powell, 6 Wheat. 119;
Ferguson v Jones, 17 Or. 204.

All the courts of the United States, except the Supreme Court, are statutory courts.

United States v Hudson, 7 Cranch. 32.

In the case of Ferguson v Jones, 17 Or. *supra.* it is said by the court that "where a court of general jurisdiction has summary powers conferred upon it, which are wholly derived from statute and not exercised according to the course of the common law, or are not part of its general jurisdiction, its decisions must be regarded and treated like those of courts of limited and special jurisdiction." See also;

1 Black on Judgments, Sec. 279 and authorities cited in note;
Bush v Hanson, 70 Ill, 480.

It cannot be questioned that this proceeding, if au-

thorized by law at all, was strictly summary in its nature. It is equally beyond doubt that not only the pleadings but the judgment in a summary proceeding must show all the requisite jurisdictional facts, and that the judgment must show a finding of these facts.

Graham v. Reynolds, 45 Ala. 578;
Hayes v. Gates, 2 Head.
Crockett v. Parkinson, 3 Coldw. 219.
Smith v Branch Bank of Mobile, 5 Ala. 25;
Andrews v Branch Bank of Mobile, 10 Ala. 375;
Barclay v Barclay, 42 Ala. 345;
Babyshall vs Oppenheimer, 4 Wash. C. C. 482.
Chandler vs Nash, 5 Mich, 409.
Clark vs Norton, 6 Minn, 412.
Pennine vs Farr 22 N. J. Law, 355.
People vs Matton, 39, How. Prac. 454.
Conley v Conley, 29 Ala. 373.
Cowdery v Town of Concades, 15 Fed. Rep. 532.
Eaton vs St. Charles county, 65 Mo. 585.

The principles expressed in these cases is that in such proceedings, even where the defendant appears, every other fact except that of notice to him must be proved and *appear in the judgment entry.* See also:

1 Black on Judgments, Sec. 280.

It appears to us that the seizure contemplated in sub-division 3 of Section 2 of the Bankrupt Act is nothing more than the one alluded to in Section 3. e. of that Act. Section 2 is most general in its phraseology, and provides the only kinds of seizures of this character mentioned in that portion of the Act preceding Section 3.e. The phraseology of Section 3.e. is as follows: "Whenever a petition is filed by any person

for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond," etc. The filing of this bond for the protection of the party from whose possession the property is to be taken, is, of course, a condition precedent to any seizure. In the Circuit Court of Appeals the Justice rendering the judgment seemed to take it for granted that the proceedings for and the issuance of the writ were taken *after* Abraham was adjudged a bankrupt, and that hence the matter did not fall "within the letter of sections 3.e. or 69.a." etc. This is only partly true. The record discloses that the writ of seizure issued at 4:50 p. m. of the 12th day of December, 1898 (Record p. 6). The adjudication of bankruptcy was rendered at *precisely the same time*, viz: "Dec. 12, 1898, at 4:50 p. m." (Record, p. 3.) Which preceded the other? Can the Court say, from the record, that the adjudication preceded the writ, and that the writ did not issue prior to the adjudication? Great particularity was shown in the filing, as to minutes, etc. Rule 2 of General Order in Bankruptcy requires this particularity and gives its significance. Nothing can be plainer than the proposition that, if the writ *issued prior* to the adjudication, the making of the bond required by Section 3.e. was an absolute prerequisite to its issuance. Nothing can be clearer than the proposition that the adjudication and the issuance of the writ could not have been simultaneous—unless the Judge was so cleverly ambi-dextrous that he could sign his name to two papers at the same time! Surely the Act of Congress has not provided for such a case as this, nor has Providence been so generous, as a

rule, to the Federal judiciary. It does not help the matter to argue that the law does not take cognizance of parts of days. Indeed, this rule is never allowed, in modern times, to contradict facts. Even were it applied, we would find the writ without authority in the Act. Congress, conceding the argument *contra*, only provided for the issuance of two kinds of summary writs: one prior to adjudication in bankruptcy—Section 3.e., and one subsequent, Section 2, subdivision 3. Section 3.e. could have no scope at all unless it included *all* cases of summary seizure before adjudication. Here, we have a case that falls within the scope of neither section, viz: the issuance of a writ of seizure *simultaneous* with the adjudication. The facts are obvious that all the papers, adjudication, petition for writ and writ itself were issued at one and the same time, and as fast as the Judge could sign them. If this is not so, then the marshal, representing the creditors here, is met with another insuperable objection which invalidates the whole proceeding—the writ issued *before any application* was filed in court. Indeed, the record shows that, while the adjudication and writ were made and issued at 4:50 p. m., December 12, the petition for it was not in court until 4:53 p. m.! Injunctions and other writs of like character cannot issue until the application or petition therefor are filed in court. Writs issued before filing of bill or complaint are *coram non judice*.

Harwell v. Potts, 80 Ala., 70.

But, we insist, as above stated, that the act only contemplated the issuance of a writ of seizure, as provided for in Section 3 e. From the phraseology of Section 2, subdivision 3, the *general* jurisdiction of the court is to issue such writs at any time after the filing of the peti-

tion, whether for voluntary or involuntary bankruptcy. This is the only character of said writs mentioned before section 3 e., and this latter section limits the method of procedure, viz: by applicant giving bond, etc. We do not see why a bond should be required in the case of such proceeding before, and one not required after, adjudication; especially where, as here, the property is shown in the application itself to be not in the hands of the bankrupt, but a purchaser from the assignee.

Considerable light is shed upon the question involved here by the provisions of Section 69 a. of the Act. The provisions of Sections 3 e. and 69 a. are nearly the same. But it can hardly be held that Congress did not intend some different application. If the words in Section 2, subdivision 3, are given their proper signification, i. e., as conferring in a general way jurisdiction to sequestrate the property of a person adjudged a bankrupt or against whom proceedings in bankruptcy have been instituted, then Section 3 e. and Section 69 a. following first, define the method of procedure to be taken in carrying out the jurisdiction conferred, and are the only portions of the act which do so define the process required. Section 3 e. expressly provides how application shall be made "*prior to adjudication*" for a seizure of the bankrupt's property. Bond is required, with sureties, to indemnify the "*respondent*" for all costs, expenses and damages "occasioned by the seizure should the petition be dismissed." We have italicized the word "respondent" to accentuate the comparison we will make between the provisions of this section and those of 69 a. The latter reads as follows: "A judge may, upon satisfactory proof, by affidavit, that a '*bankrupt*' against whom an involuntary petition has been filed (the case here) and is pending, has committed an act of bankruptcy, or has neglected or is neglecting or is about to neglect his

property, that is thereby deteriorating or is about to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. *Before such warrant is issued* the petitioners applying therefor shall enter into a bond in such amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such *bankrupt* for such damages as he shall sustain in event such seizure shall prove to have been wrongfully obtained," etc. The act is certainly obscure in these two sections. But Section 3 e. obviously refers to a mere "respondent" to a proceeding in bankruptcy. Section 69 a. clearly includes one who has been adjudicated a "bankrupt," for one is not a bankrupt until adjudication. The facts in this case also show that these petitioners endeavored to get a restraining order against Davidson, the assignee, to prevent his selling the property, but, declining to give bond, the judge refused to restrain Davidson; in this instance only, showing some consideration for persons other than the creditors.

The application for a writ of seizure was made under either section 3 e. or under section 69 a. Under either, the writ was wrongfully and illegally issued, for no bond was required or given for the issuance. The facts demonstrate to our mind that there is nothing in the record which shows that the writ was issued subsequent to the adjudication. The court's attention is especially directed to the petition for this writ filed by the creditors. (See page 4 of Record.) Nowhere in it is it averred that, at the time of the filing thereof, Abraham *had been adjudged* a bankrupt. Indeed, it was a physical impossibility that he had been so adjudged at that time. The petition shows on its face that it was filed under Section 3 e. or 69 a. The judgment of the court ordering the issuance of the writ fails to show that the ad-

judication had been made (See page 6 of the Record) and the adjudication (page 3 of the Record) shows that it had not been made when the writ issued.

So, even if the court should hold for naught the fact of Bernheimer's purchase, his adverse claim and that he bought after the District Court had refused to enjoin Davidson from selling, and hence had allowed him to hold himself out to the world as authorized to sell, and this because the creditors declined to give any bond; even if the statutory rule laid down in Smith v. Mason, Marshal v. Knox and Massey v. Allen, *supra*, is to be overturned, yet sentence of nullity must be pronounced against this extraordinary and unauthorized proceeding of the District Court of the Middle District of Alabama, sitting as a court of Bankruptcy.

A case fully approving the opinion rendered in this cause by the Circuit Court of Appeals for the Fifth Circuit was lately decided in North Carolina.

Loan & Trust Co. v. Benbow, Vol. 3, Bo. 1, Am. Bnkr. Rep., p. 9.

The proceedings in bankruptcy are equivalent to a general creditor's bill in equity. So far as not varied by law the practice should be the same. The collateral proceedings are the same, as like collateral proceedings in such bills in chancery, and are summary *only* when they would be so in a creditor's bill.

Black, on Bankruptcy, p. 8, and authorities cited.

2. The second question involved is: Was the Circuit Court of Appeals justified, from the facts disclosed in this record, in holding that the petitioning creditors

were liable, under sections 3 e. and 69 a. of the Bankrupt Act, for the costs, expenses and counsel fees incurred by Bernheimer by reason of the unlawful seizure of his property?

As we have said, we differ from the Circuit Court of Appeals as to the statement in its opinion that the action of the creditors of Abraham in suing out this writ was not within the letter of Sections 3 e. and 69 a. As we have shown, it was a physical impossibility that the writ of seizure could have been issued after the adjudication of Abraham as a bankrupt. We think we have shown, also, that the provisions of Section 69 a. apply to cases where writs of seizure issue at any time pending proceedings in bankruptcy. If we are correct, then either of said sections "denounce against them (the creditors) the penalty prescribed for wrongfully obtaining thereunder the seizure of the property of the alleged bankrupt." If the "application for the writ to seize and the seizure thereunder of the goods in controversy was a flagrant violation" of the provisions of Sections 3.e. and 69.a. of the Bankrupt Act, in letter *or* in spirit, was the Bankrupt Court powerless to give relief to the person wronged?

Subdivision 15 of Section 2 of the Bankrupt Act empowers the District Courts to "make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of this Act.

In the dissenting opinion of Judge Parlange, in this case, in the Circuit Court of Appeals, he bases his dissent on the allowance to Bernheimer of costs, counsel fees, etc., *alone*, and says, in this connection, that as the District Court had no jurisdiction to issue this writ and

try the title to the goods in controversy by such summary process, that it could not award costs or order execution for them to issue. This might be so if the Court had no jurisdiction over the parties to the bankrupt proceeding. But it undoubtedly *had* such jurisdiction over the petitioning creditors of Abraham. They had invoked, in the first instance, the Court's jurisdiction by the petition for involuntary bankruptcy against Abraham. They were in court, and subject to its orders and process, and would be so subject until, at least, the discharge of the bankrupt. Probably until the final winding up of the bankrupt's estate. In most respects, the proceedings in a Bankrupt Court are for the same purpose and governed by the same principles which control Courts of Equity in dealing with a trust estate committed to its charge, or in cases of a general creditors' bill in Chancery. So far as not varied by the statute, the practice should be the same.

Black on Bankruptcy, p. 8.
Re. Anderson, 23 Fed. Rep. 482.

It can surely be within its powers to prevent an abuse of its process and render such orders or enter such decrees as will punish such abuse, and, further, to put in *statu quo* any one injured by such abuse. The duty is specifically enjoined on it to "enter such judgments *** as may be necessary to enforce the provisions of this act."

Section 2, subdivision 15, above cited.

One of the express provisions of the Act is that the estate of the bankrupt cannot be seized without provision for his indemnity by giving bond before seizure.

Secs. 3.e. and 69.a.

The phraseology of the last paragraph of Section 2 is significant in this connection. "Nothing in this section contained shall be construed to deprive a Court of Bankruptcy of any power it would possess, were certain specific powers not herein enumerated." The jurisdiction of the Bankrupt Court, being plenary, so far as the petitioning creditors are concerned, they having come into it voluntarily and Bernheimer having been forced in by a wrongful writ and seizure and his property put in *custodia legis*, why should not he be allowed complete relief without resorting to some other forum? The wrong was done him in the District Court—why should not that Court right the wrong? It is axiomatic that a Court of Equity, having jurisdiction of the parties—plenary jurisdiction so far as these petitioning creditors are concerned—and of the subject matter, will make its jurisdiction effectual for complete relief.

Ober v. Gallagher, 93 U. S., 199.

Suppose a receiver, appointed under a general creditor's bill, in equity, instigated by complainants, should seize the property of an outsider and put him to great costs and expense? Would not the court, in ordering a restoration of the property, adjudge that those who procured the doing of the unlawful act by abuse of its process be compelled, not only to make restoration of the property seized, but compensation for the wrong they had done the person injured by the seizure? And, if the court would do so on application, should it not, when its eyes are opened by its own reflection or its sense of justice quickened by an appellate tribunal, do this same right without an application and in the same suit in which the wrong was perpetrated?—the Abraham bankrupt proceeding here.

Something was said by Judge Parlange, in his dissenting opinion, about no demand being made by Bernheimer for counsel fees, damages and costs incurred by him by reason of this summary proceeding, and that, hence, the same should not be allowed him. A casual inspection of this record will show that Bernheimer was in no position, in the District Court, to ask for anything. The very limit given him by the court's rule to show cause, issued at the marshal's instance and after his goods were seized, was to come in and propound his claim to the goods, and this *alone*. A chalk mark was drawn for him to go by; he was to walk a tight rope stretched by the court, and was evidently treated as an enemy and not a suitor in that temple of justice. His deprecating answer, in response to the court's stern mandate, shows his state of mind and estate at this critical juncture in his commercial career. If the court will pardon a little levity by way of illustration, he was like the minister after sending around his hat for contributions among a sordid congregation; if he got anything back he might exclaim with that preacher, "I thank God that I have got my hat back from this congregation!" But his modesty in the face of great peril should not now estop him from claiming what is of right his, or in receiving the reimbursement to which he was entitled from the law's sense of justice.

We refer to the learned opinion of the Circuit Court of Appeals, page 39 of Record, for further argument on this question.

3. We can add nothing to the argument of Judge McCormick in this case on the motion to dismiss the appeal. This argument is found on pages 35 to 38 inclusive, of the Record. Again, we are informed by counsel *contra* that it will not be insisted that the Cir-

cuit Court of Appeals erred in refusing to grant the motion to dismiss the appeal.

The late case of Re. Sarah Cohn, Am. Bankruptcy Reports, Vol. 3, No. 3, for March, 1900, contains an emphatic declaration in the opinion by Judge Brown of the District Court for the Southern District of New York, against such summary proceeding as the one assailed here.

We attach to this brief a copy of the sections of the Alabama Code, bearing on assignments for the benefit of creditors.

Respectfully submitted,
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AND
GORDON MACDONALD,
Counsel for Louis Bernheimer.

SECTIONS 4156 AND 4157 OF THE CODE OF ALABAMA, OF 1896.

As to Assignments for Benefit of Creditors.

4156. TRUSTEES TO MAKE INVENTORY OF TRUST PROPERTY AND FILE TWO COPIES WITH THE REGISTER. It is the duty of the trustee of an express trust created for the payment of debts, within ten days after entering upon the execution of such trust, to make an inventory of the entire trust property so far as the same has come to his possession or knowledge, describing the real estate and grouping or classifying the personal property in as brief and comprehensive manner as may be con-

sistent with its proper identification and appraisement, and stating the amount and character of all choses in action, with the names of debtors, belonging to the trust. In reducing such inventory to writing, the trustee must leave appropriate spaces opposite each article or item, with proper caption, in which spaces the appraised value may be inserted by the appraisers. The trustee must, within the time above stipulated, file, in the office of the Register in Chancery of the district in which the most valuable portion of the trust property may be, two copies of such inventory, each of which shall be duly verified by his affidavit; and if there be property in more than one county, a separate inventory of the property in each county must be made and filed. Supplemental inventories may be made in like manner.

4157. APPOINTMENT AND DUTY OF APPRAISERS.—On the filing of such inventory the register must indorse upon each of such copies the fact and date of such filing and must appoint three competent and disinterested persons, who must not be of kin or of counsel to any person interested in the trust estate, appraisers of and in each county in which any part of the trust property may be, and must attach to the commission one of the copies of such inventory filed by the trustee; and the appraisers must, in writing, appraise at its true value, the property described in such inventory and set down in figures opposite each article or item, the appraised value thereof, add each column and carry forward the result so as to show the aggregate or total valuation placed upon such property, and verify the same by affidavit and make return thereof to the register who must record the commission to the appraisers and such combined inventory and appraisement, together with the affidavits appended thereto. The other copy of the inventory filed by the trustee must be carefully pre-

served by the register, free to the examination of all persons, but must not be recorded. The appraisers are severally entitled to two dollars for each day's service in making such appraisement, to be taxed as costs and collected and paid over by the register.

Filed Oct. 27, 1904.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 58.

L. J. BRYAN, As Marshal, for the Use of Chesapeake, Petitioner,

vs.

LOUIS BERNHEIMER.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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Attorneys for Respondent.

(17,411.)

Judd & Detweiler, Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 58.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

L. J. BRYAN, AS MARSHAL FOR THE USE, &C.,

vs.

LOUIS BERNHEIMER.

Supplemental Brief of R. E. Steiner and Gordon Macdonald, for Louis Bernheimer.

Subsequent to the filing of the record in this court, the main question involved was decided by the Supreme Court of the United States.

Appellant sought, by summary proceedings, to try the title to certain goods in the district court, sitting in bankruptcy, and the presiding judge held that the district court, sitting in bankruptcy, had the jurisdiction to decide between

an adverse holder and the marshal, acting as temporary receiver (or trustee), the right between these parties, and this, too, without the filing of a plenary bill, but simply by summary motion to adverse holder to appear and show cause, if any he had, why he should not be decreed to be the fraudulent recipient of said goods.

The following cases, decided at the last term of this court, fully and finally decides the proposition against this jurisdiction, and to this extent affirms the decree of the circuit court of appeals. (See Bardes *vs.* Hawarden Bank, 178 U. S., 524; Mitchell *vs.* McClure, 178 U. S., 539, and Hicks *vs.* Knost, 178 U. S., 541.)

It cannot be contended that defendant (Bernheimer) consented to the district court taking jurisdiction. He stoutly resented the assertion of this right, and only came in to protest and to show the court that it had no right to force him into the forum of the bankrupt court to test the questions involved, and immediately appealed from the district court's ruling when it decreed that he (Bernheimer) had no interest in the property. The three cases cited above decide that the district court, sitting in bankruptcy, has no jurisdiction "over suits brought by trustees in bankruptcy to recover or collect debts due from third parties or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors."

It must necessarily follow that the district court, which had no jurisdiction over a suit commenced by a plenary bill, could most certainly not secure to itself this jurisdiction by summary proceedings. The opinion of Mr. Justice Gray, in Bardes *vs.* Hawarden Bank, *supra*, affirms the doctrine

laid down in Smith *vs.* Mason, 14 Wall., 419; Marshall *vs.* Knox, 16 Wall., 551–557; Eyster *vs.* Goff, 91 U. S., 521–525, on the question of trying the right to property by summary proceeding.

It follows, therefore, that the opinion of the circuit court of appeals should be affirmed on this proposition, and that therefore Bernheimer should be allowed counsel fees, costs, etc., for this most unjust proceeding, covering as it does nearly two years in point of time and the various courts of the United States.

Respectfully submitted.

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Supreme Court of the United States.

No. 58.—October Term, 1900.

L. J. Bryan, as Marshal, for the use of creditors, Petitioner, *vs.* Louis Bernheimer. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

This was a summary petition to the District Court of the United States for the Middle District of Alabama, sitting in bankruptcy, for an order to Bryan, the marshal of the District, to take immediate possession of property of David Abraham, a bankrupt, in the hands of Louis Bernheimer. The material facts, as appearing by the record, were as follows:

On October 29, 1898, Abraham made a general assignment of all his property, consisting of his stock of goods and book accounts, in a storehouse numbered 106 Dexter Avenue in Montgomery, Alabama, for the equal benefit of all his creditors, to one H. C. Davidson, who had the assignment recorded, and caused to be filed an inventory, and an appraisement of the property at the sum of $7900, in a court of Alabama, according to the laws of the State, (Civil Code of Alabama of 1896, c. 113,) and forthwith took possession of the property.

On November 7, 1898, certain creditors of Abraham filed in the District Court of the United States, sitting in bankruptcy, a petition alleging that said assignment was an act of bankruptcy, and praying that he might be adjudged a bankrupt.

On December 12, 1898, Abraham, after due notice to him, was adjudged a bankrupt. On the same day, the petitioning creditors presented to the District Court a petition, alleging the assignment to Davidson, and the adjudication in bankruptcy, and that upon the filing of the petition for that adjudication the court obtained jurisdiction over Abraham's estate, and it was the duty of Davidson, as his assignee, to hold all his property subject to the orders of the court; but that Davidson, disregarding the authority and jurisdiction of the court, had sold and disposed of the property at much less than the aforesaid appraisement, and the purchasers had been in possession of the property for several days, selling and disposing thereof at retail and at bankrupt prices; and that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged, and their dividends out of the estate greatly lessened; and praying for an order to the marshal of the District to take possession of, and to hold until further order of

the court, all the property owned by Abraham at the time of his assignment to Davidson, wherever the same might be found, and all property sold by Davidson to Louis Bernheimer or to any one else, and being in the storehouse numbered 106 Dexter Avenue in Montgomery, and to hold it until the further order of the court. On the filing of this petition, the District Court made the order therein prayed for, reciting "it further appearing from said petition that it is necessary to the interest of the creditors of the said Abraham that this court take possession of all the property and effects of said Abraham." And on the same day the marshal, pursuant to that order, seized the stock of goods in Bernheimer's possession.

On December 13, 1898, the District Court, on a petition of the marshal for instructions concerning the goods seized by him, ordered that notice be given to Bernheimer to appear in ten days, and to propound any claim that he had to the goods so seized, or, on failing to do so, be decreed to have no claim or right to them; and directed the marshal to retain possession of the goods until the further order of the court.

On December 17, 1898, the petitioning creditors presented another petition to the District Court, further alleging that on or about November 17, 1898, after the filing of the petition in bankruptcy against Abraham, and in disregard of the proceedings thereon pending, Davidson turned over and delivered to Bernheimer the whole stock of goods, then worth about $10,000, and Bernheimer, with knowledge of the pending proceedings in bankruptcy, took possession of the goods, sold large quantities thereof, and received large sums of money therefor, before the rest was taken by order of the court into the hands of the marshal; and praying for an order that Bernheimer file with the referee in bankruptcy an account of the moneys so received by him.

On December 22, 1898, Bernheimer, in obedience to the order of December 13, came into the District Court, and propounded a claim to the stock of goods. The claim stated the assignment to Davidson, and the petition for an adjudication of bankruptcy, and that the petitioning creditors afterwards filed a petition in the court of bankruptcy, praying that Davidson be required to appear and show cause why he should not be restrained from selling the goods so assigned to him; that, in obedience to a rule issued on that petition, Davidson appeared and showed cause satisfactory to the court; and that the court, on the ground that the petition was not sworn to, nor any bond given, discharged the rule against him, declined to grant the restraining order, and dismissed the petition without prejudice. The claim further stated that Davidson thereupon proceeded to sell the goods by public auction, and the claimant, acting in good faith and under the advice of counsel, bought the goods from Davidson at the sale by public auction for the sum of $3500, which was a fair and reasonable price, and paid the price in cash to Davidson, and took and kept possession of the goods until

deprived thereof by the marshal; that the claimant never intended to interfere in any way with the process of the court, or with any property of the bankrupt; that if he was deprived of these goods, and Davidson was allowed to keep the money paid him by the claimant as their price, the claimant's position would be one of great hardship and loss; that Davidson, under the terms of the assignment to him, would be compelled to pay that money to Abraham's creditors, and the goods purchased in good faith by the claimant would also be held and sold again for the benefit of those creditors. Bernheimer's claim concluded as follows: "Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises, and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also that, in default of such order, or if he is mistaken in the relief prayed for, your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant, as purchase money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods."

On December 24, Bernheimer, in answer to the petition of December 17, filed an account as therein requested, showing that he had received, from sales of the goods, sums amounting to $2768.40; that at the time of his purchase from Davidson he also bought the exemptions allowed to the bankrupt under the laws of Alabama and the Bankrupt Act of 1898, amounting to the sum of $1000; and that, deducting that sum and necessary expenses, he had a net balance in his hands of $1434.80.

On the same 24th of December, the petitioning creditors demurred to the claim of Bernheimer, because it showed no title in Bernheimer good as against their rights; because the alleged sale by Davidson to Bernheimer was made with knowledge by both of the filing of the petition in bankruptcy, and after the court of bankruptcy had acquired jurisdiction of the property; because the deed of assignment to Davidson was an act of bankruptcy, void as against the petitioning creditors; and because Bernheimer asked the court to settle and decide questions between him and Davidson which it had no jurisdiction to try and determine.

On the same day, the District Court sustained the demurrer; and, Bernheimer declining to plead further, adjudged and decreed "that the said Louis Bernheimer acquired no title to the said goods, or to the proceeds of the sales thereof made by him, under the purchase of said goods from H. C. Davidson as assignee of said bankrupt, superior to the title of said bankrupt estate;" and that Bernheimer pay over to the marshal, to await the further order of the court, all the proceeds, to be ascertained by a referee in bankruptcy, of the sales made by him of those goods.

Bernheimer appealed to the Circuit Court of Appeals, which, considering the case as if before it on a petition for revision of the decree of the District Court, reversed that decree; and ordered the cause to be remanded to that court, with instructions to dismiss the petition against Bernheimer, to vacate all orders made thereon, and to restore to him the goods taken from his possession; and further ordered that all costs, counsel fees, expenses and damages, occasioned to him by the marshal's seizure and detention of the property, be fixed and allowed by the court of bankruptcy, and paid by the petitioning creditors. 93 Fed. Rep. 767; 35 C. C. A. 592.

The marshal, in behalf of the petitioning creditors, thereupon obtained a writ of certiorari from this court. 175 U. S. 724.

[April 15, 1901.]

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the Court.

The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent. Bankrupt Act of July 1, 1898, c. 171, § 3; *West Co.* v. *Lea*, 174 U. S. 590.

Nine days after this assignment, certain creditors of Abraham filed a petition in the District Court of the United States to have him adjudged a bankrupt, alleging this assignment as an act of bankruptcy. After the filing of that petition, Davidson sold the property to Bernheimer, and the District Court, after the adjudication of bankruptcy, and on petition of the same creditors, alleging that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged, and their dividends out of the estate greatly lessened, and praying for an order to the marshal to take possession of the property, ordered the marshal to do so; and on his petition for instructions as to the property so seized, ordered notice to Bernheimer to appear in ten days, and to propound any claim that he had to the property, or, on failing to do so, be decreed to have no right to it. In obedience to that order, Bernheimer came into court, and propounded a claim to the property under the sale by Davidson to him, alleging that if he was deprived of it, and Davidson was allowed also to keep the price paid, his position would be one of great hardship; submitting his claim to the court, and asking it to make such orders as might be necessary for his protection; and praying that the creditors be remitted to their claim against Davidson for such price, or, if the claimant was mistaken in the

relief he prayed for, for an order that such price be paid by Davidson into court and paid over to the claimant, who thereupon offered to rescind the the purchase and to waive all further claim to the property.

The District Court sustained a demurrer of the petitioning creditors to this claim, and decreed that Bernheimer had no title superior to the title of the bankrupt estate. On his appeal from that decree, the Circuit Court of Appeals reversed it, and ordered the property to be restored to him, with costs, counsel fees, expenses and damages, occasioned to him by the seizure. The marshal, in behalf of the petitioning creditors, thereupon obtained this writ of certiorari.

The case, as the opinion of the Circuit Court of Appeals states, presents this question: "Did the District Court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods, and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him, to appear before that court within ten days and propound any claim he had to the goods, or any part thereof; or, failing therein, that he be decreed to have no claim or right thereto?"

The Bankrupt Act of 1898, § 2, invests the courts of bankruptcy "with such jurisdiction, at law and in equity, as to enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms;" to make adjudications of bankruptcy; and, among other things "(3) appoint receivers or the marshals, upon application of the parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The exception refers to the provisions of section 23, by virtue of which, as adjudged at the last term of this court, the District Court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Mitchell* v. *McClure*, 178 U. S. 539; *Hicks* v. *Knost*, 178 U. S. 541.

The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself.

Nor is it a petition under § 3*e* or § 69 of the Bankrupt Act of 1898, each of which relates to applications to take charge of and hold property of a

bankrupt after the petition and before the adjudication in bankruptcy. The provisions of those sections, requiring the applicants to give bond for damages, have no application to a case where there has been an adjudication of bankruptcy, and the property thereby brought within the jurisdiction of the court of bankruptcy.

But it is a petition filed after an adjudication of bankruptcy and before the appointment of a trustee; and must rest on the authority given to the court of bankruptcy, by clause 3 of section 2, to "appoint receivers or the marshals, upon application of parties in interest, in case the courts will find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Does this include property of the bankrupt in the hands of third persons?

The Bankrupt Act of March 2, 1867, c. 176, § 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of his property, the court might issue a warrant to the marshal commanding him "forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court." 14 Stat. 536; Rev. Stat. § 5024. It was held by the Court of Appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. *Doyle* v. *Sharpe*, 74 N. Y. 154. But that decision was overruled by this court, and Mr. Justice Miller in delivering its opinion said:

"The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee, a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property

as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it." *Sharpe* v. *Doyle*, 102 U. S. 686, 689, 690. A like decision was made in *Feibelman* v. *Packard*, 109 U. S. 421.

These considerations are equally applicable to an application, after the adjudication in bankruptcy and before the qualification of a trustee, for an appointment of the marshal, under clause 3 of section 2 of the Bankrupt Act of 1898, to take charge of "the property" of the bankrupt "after the filing of the petition and until it is dismissed or the trustee qualified." It is true that under this provision the appointment is only to be made "in case the courts shall find it absolutely necessary for the preservation of estates." But that condition of things is shown, in the present case, by the allegation of the application, and the finding of the court of bankruptcy, that it was necessary to the interest of the creditors of the bankrupt to take immediate possession of his property.

In the opinion in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 538, it was indeed said: "The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him." But the remark, "can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant," was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment.

Moreover, the consent of the proposed defendant, Bernheimer, to this mode of proceeding is shown by the terms of his claim, in which, not protesting against the jurisdiction of the court of bankruptcy, he expressly submitted his claim to that court, and asked for such orders as might be necessary for his protection.

Considering that the property was not held by Davidson under any claim of right in himself, but under a general assignment which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; and that Bernheimer consented to the form of proceeding; we are of opinion that Bernheimer had no title superior to the title of the bankrupt's estate; that the District Court, as a court of bankruptcy, was authorized so to decide in this proceeding; and that the decree of the Circuit Court of Appeals, directing the goods to be restored to Bernheimer, must be reversed.

The question remains what further order should be made. It is manifestly inequitable that Bernheimer should lose both the goods themselves and the price which he had paid to Davidson for them. His equities in that respect, and the rightful claim of the bankrupt's creditors against him, may depend upon many circumstances, and can be best settled in the District Court, which has authority, under clause 6 of section 2 of the Bankrupt Act of 1898, to bring in Davidson if necessary for the complete determination of the matter.

Judgment of the Circuit Court of Appeals reversed, and case remanded to District Court for further proceedings in conformity with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.